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*The Decision Making Process of Appeals Against Conviction in
the Court of Appeal (Criminal Division)*

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A thesis submitted to the Department of Law of the London
School of Economics for the degree of Doctor of Philosophy,
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ABSTRACT

This study seeks to find an explanation for the two main problems associated with the Criminal Division of the Court of Appeal which are, its problems in identifying and correcting the wrongful convictions of the factually innocent, and its inconsistent, unpredictable and contradictory decision making. This study uses empirical data collected from the judgments of the Court to analyse the decision making process of the Court in relation to the powers given to it in the Criminal Appeal Act 1995. The data collected is used to analyse the Court's powers in four main areas which are appeals where the appellant wishes to adduce fresh evidence, appeals where there is a 'lurking doubt', appeals where the appellant is arguing an error occurred either pre-trial or during the trial and the Court's approach to the issue of ordering a retrial. The research conducted for this thesis is a replication study of previous research carried out for the Royal Commission on Criminal Justice which proposed reforms to the Court's powers and ultimately led to the Criminal Appeal Act 1995. The aim of the research is to analyse whether the Court uses an identifiable approach to its various powers, in order to find an explanation as to why the Court has proved so deficient at identifying and correcting the wrongful convictions of the factually innocent, and why its decision making is so inconsistent and unpredictable.

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LIST OF ABBREVIATIONS

| | |
|------|--------------------------------------|
| CAA | Criminal Appeal Act |
| CCRC | Criminal Cases Review Commission |
| CJA | Criminal Justice Act |
| CPS | Crown Prosecution Service |
| ECHR | European Convention on Human Rights |
| HRA | Human Rights Act |
| PACE | Police and Criminal Evidence Act |
| PII | Public Interest Immunity |
| RCCJ | Royal Commission on Criminal Justice |

CHAPTER ONE: INTRODUCTION

In his report, *Access to Justice*, Lord Woolf stated (1996, p. 153) that there are two main purposes of appeals. The first is the private one of doing justice in individual cases by correcting wrong decisions. The second is the public one of engendering public confidence in the administration of justice by correcting wrongs and in clarifying and developing the law. If this is an accurate assessment of the purposes of appeals, it would appear that since the Court of Criminal Appeal¹ was created in 1907, the Criminal Division of the Court of Appeal has been criticised for being defective on both fronts. The two main criticisms of the Court have been its deficiencies in identifying and correcting miscarriages of justice and its inconsistent, unpredictable and contradictory decision making. Whilst these may appear to be separate issues they are in fact connected and this thesis will argue that these problems are an inevitable result of the Court's decision making process and in particular, its function as a court of review. In short, the study has concluded that a court of rehearing would be much more effective at rectifying miscarriages of justice.

In order to define these problems in more detail, it is necessary to discuss the meaning of the term 'miscarriage of justice' to illustrate where the Court's problems lie.

Defining 'miscarriages of justice'

There have been a number of attempts to define a 'miscarriage of justice.' In a factual sense, a person is innocent if they did not commit the crime.² Innocence in the legal sense and context is much more complex. There are a myriad of ways in which innocence could be defined.³ In the criminal justice system, a person may be considered wrongly convicted if there were procedural or legal errors upon which to found a successful appeal. But whilst this may qualify as wrongful conviction in the legal sense, it would generally not be understood as innocence outside the legal arena. There is a natural tension between the commonly held notions of 'innocence' (which is also usually utilised by the media) and the concept of 'innocence' or 'wrongful conviction' as it applies in the legal system. Whilst the public and media perception of terms such as 'wrongful conviction' and 'miscarriage of justice' may appear to relate more to actual innocence than procedural errors, the legal system has adopted much broader definitions to include both. This is illustrated by the speech of Lord Bingham in *R (on the application of Mullen) v Secretary of State for the Home Department*:

¹ The Court of Criminal Appeal became the Criminal Division of the Court of Appeal in the Criminal Appeal Act 1966.

² This person is considered to be 'factually' or 'actually' innocent.

³ For a discussion on definitions of innocence see Burnett (2002).

'The expression "wrongful conviction" is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.'⁴

And similarly in relation to miscarriage of justice:

"Miscarriage of justice" is an expression which, although very familiar, is not a legal term of art and has no settled meaning. Like "wrongful conviction" it can be used to describe the conviction of the demonstrably innocent. But, again like "wrongful conviction", it can be said and has been used to describe cases in which defendants, guilty or not, certainly should not have been convicted.'⁵

Lord Bingham's definitions are useful for understanding these terms in a broad sense, but there have been various arguments put forward which provide a more detailed analysis of what these terms may mean and the approaches to them.

Nobles and Schiff adopt a systems theory approach to defining miscarriages of justice, namely autopoiesis, utilising the work of Niklas Luhmann and Gunter Teubner (Nobles and Schiff, 1995). Within this theory, a legal definition of 'wrongful conviction' is the definition that would be legally understood by the system. Other (non-legal) systems may have other definitions that accord with their frames of reference. The application of autopoiesis to miscarriages of justice helps to explain why there may be different interpretations and possible tensions between the differing definitions of 'wrongful conviction' and 'miscarriage of justice'. Nobles and Schiff consider that the media (and the general public) may interpret the term differently from how the legal system would define it, leading to understandable yet inexorable confusion of meaning (Nobles and Schiff, 1995, p. 299).⁶

Using autopoiesis systems theory, the Court of Appeal would apply the code of what is legal or illegal. Whilst it is a common perception amongst those outside the legal arena

⁴ *R (on the application of Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 at para. 4.

⁵ *Ibid*, at para 9.

⁶ See generally, Nobles and Schiff (2004) for an application of autopoiesis to the Sally Clark case.

that it is the role of the Court of Appeal to declare people innocent, this is not allowed within its legally defined role.⁷ Instead, it is argued that the media and the Court of Appeal produce different communications about miscarriages of justice. The media would misread a quashed conviction as a declaration of innocence, and the Court of Appeal would reject a lay perception of factual innocence when constructing whether a conviction is unsafe.⁸ This may cause problems for defendants⁹ or the media¹⁰ who consider that the Court's role is to free innocent people and offer an apology when quashing convictions. The public may also express concern and in some instances disgust in situations in which it views people 'getting off on a technicality' who may be guilty. The difference in frame of reference may also cause problems for the Court when it is considered slow to react or understand public pressure for reform when convictions of those the public consider to be innocent are not quashed, or not quashed quickly enough. A history of criminal appeals reveals that it is in these times of public pressure that the Court is reformed.

In defining a miscarriage of justice, Greer adopts a human rights approach. He accepts that the conviction of the factually innocent is one possible definition but suggests a number of other definitions. These are divided into two categories. The first category is 'the unjustified avoidance of conviction' which includes alleged defects in the substantive criminal law; alleged defects in criminal procedure; decisions not to charge or prosecute or unjustified acquittals (deliberate external influence with the trial process or inherent bias on the part of tribunals). The second category is 'unjustified convictions' which includes criminal conduct which should be lawful; plea, charge and sentence bargaining; convictions obtained in special anti-terrorist criminal justice processes; or convictions stemming from impropriety or mistaken convictions (Greer, 1994, p.74).

Similarly to Greer, Walker argues that one possible definition of a 'miscarriage of justice' is one which reflects 'an individualistic rights based approach.' He suggests that a miscarriage occurs whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the state to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not

⁷ In *R v A(D)*, Lord Bingham stated 'the Court is in no position to declare that the appellant is innocent...That is not the function of this court. Our function is to consider whether in the light of all the material before us this conviction is unsafe.' [CA, unreported, transcript 14 March 2000].

⁸ The Court of Appeal's current test for quashing convictions which is discussed later in this chapter.

⁹ At a press conference after the Birmingham Six were freed, one of the six, William Power criticised the appeal system and stated: 'It's all about points of law. It had nothing to do with justice. The truth didn't come out. Nobody was interested in the truth.' *The Times*, 15 March 1991.

¹⁰ The judgment of Lord Lane, when freeing the Guildford Four, was criticised in a *Sunday Times* editorial in the following terms: 'Not a single word of apology for their years of wrongful imprisonment were uttered. No declaration of innocence was made for the record.' 17 March 1991.

effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself (Walker, 1999, p. 33). Walker states that those who are wrongly convicted because they are factually innocent would fall into the third category but there should be a qualification on this, namely that the system should be allowed some time to correct itself, whether through acquittal or the payment of damages. Consequently, the notion of 'miscarriage' involves a completion of a process (in failure) and not simply a mistake. Therefore, using this argument, the term 'miscarriage of justice' would only be used to describe those cases that have been through the appeal process and failed and are sent back to the Court and then overturned.

Naughton divides miscarriages of justice into the 'exceptional,' the 'routine,' and the 'mundane.' He states that criminal justice reform typically focuses on exceptional cases which are those cases that are referred back to the Court of Appeal after the initial appeal has failed. He defines 'routine' miscarriages of justice as those which are quashed by the Court of Appeal on the first appeal and 'mundane' miscarriages as those which are quashed by the Crown Court after appeal from the Magistrates Court on the first appeal. He argues that the consequences of focusing on the 'exceptional' cases are that the true scale of miscarriages of justice may be overlooked and an extensive range of harmful consequences (zemiological harms) that accompany routine and mundane miscarriages of justice may also be overlooked (Naughton 2007). If we use Walker's argument, Naughton's 'routine' and 'mundane' appeals would not be classed as miscarriages of justice as this term would only apply to Naughton's 'exceptional' cases. This potentially explains why criminal justice reform typically focuses on those 'exceptional' cases. Even within academic legal discourse there is a divergence of opinion on an appropriate definition.

Naughton is correct in that 'miscarriage of justice discourse' does typically focus on the cases he deems 'exceptional.' These are cases where the appeal process has previously failed and the appellant has been forced to locate some new evidence or argument in order to be referred back to the Court of Appeal.¹¹ These appellants are more likely to be accepted by the media and the public to be factually innocent of the crime. Their cases tend to have more resonance than someone who may have succeeded at the first appeal on the basis of a procedural irregularity as the media and public may consider this appellant to be 'getting off on a technicality.' The perceived failings of the appeal process to rectify miscarriages of justice means that appellants are often forced to go back to the appeal court a number of times before they are successful which is what makes these cases 'exceptional.' In that sense they are 'true' miscarriages

¹¹ This procedure was previously the Home Secretary's reference under section 17 of the Criminal Appeal Act 1968 but is now undertaken by the Criminal Cases Review Commission. This procedure is discussed in more detail in chapter three.

of justice, using Walker's analogy above, as every part of the criminal justice system has failed including the appellate process.

This thesis seeks to find an explanation for why these 'exceptional' appeals are exceptional. These appeals are illustrative of the problems of the appellate procedure and it is important to note that as Savage *et al* state:

'.....the appeals procedures have only a partial role in the 'governance' of miscarriages of justice. To begin with they only operate in relation to miscarriages of justice based on questionable conviction and have no role in relation to that other sector of miscarriages of justice based on what we shall call 'questionable actions', such as inadequate police investigations, decisions not to prosecute and so on. The latter are as important 'drivers' of criminal justice reform as questionable convictions. Furthermore, as the case of the 'Birmingham Six' made all too clear, the appeals procedures themselves can be instrumental in allowing miscarriages of justice to take place.....they can be as much a part of the 'problem' as a 'solution' to miscarriages of justice' (Savage *et al*, 2007, p. 84).

This study examines why appeal procedures, namely appeals against conviction in the Court of Appeal, can be instrumental in allowing miscarriages of justice to take place and why they can be as much a part of the problem as a solution.

The Court's deficiencies in identifying and correcting miscarriages of justice and its inconsistent and unpredictable decision making have been well documented over the years. In order to illustrate and explain some of these inconsistencies it is necessary to outline why the Court was created in the first place, which was primarily to provide a tribunal for reviewing the findings of the jury. The years between 1844 and 1906 had seen the publication of several official reports stating the need for reform which had highlighted the inconsistencies and deficiencies in the state of the law, often in response to particular cases of alleged miscarriages of justice and the publicity that had surrounded them. A major contradiction at this time was the discrepancy between the availability of appeal in civil cases but not in criminal cases¹² and the first bill to reform the criminal appeal system had been introduced with the object of assimilating civil and criminal appeals.

It is now well documented¹³ that it took approximately 31 bills¹⁴ over sixty years before the Court of Criminal Appeal was created and the main protagonists against reform in

¹² See for example the views of the Commissioners on Criminal Law in their *Eighth Report* in 1845, p.20: '...it cannot be denied that a failure of justice in a criminal case, where it may concern not only property, liberty, but even life itself, is of much more serious importance than in civil cases, where a mere question of property is concerned.'

¹³ See Pattenden (1996); Nobles and Schiff, (2000).

¹⁴ This is an approximate figure because different sources suggest different numbers of bills but this is the figure listed in the *Return of Criminal Appeal Bills* (1906) H.L. 201.

the nineteenth century proved to be the judges. Various reports from the period¹⁵ reveal that the judges were not opposed to a criminal appeal system as such, as the judiciary did not object to their decisions being reviewed in relation to sentences or questions of law, but were clearly very hostile to an appeal system based on errors of fact. The reasons given by the judges were to resonate through the history of criminal appeals and can be summed up as follows: they did not believe that innocent people were convicted;¹⁶ they felt that it would lessen the responsibility felt by jurors who would be less reluctant to convict on doubtful evidence if they knew the decision could be appealed;¹⁷ they felt a right of appeal would lessen the deterrent effect of the criminal law;¹⁸ and they felt that there were insufficient numbers of judges to handle the anticipated volume of appeals.¹⁹ Thus, the development of a court of criminal appeal was stifled by the judiciary on public policy grounds, at odds with the public policy concerns expressed in the official reports of the time.

An inevitable consequence of the lack of appeal remedies in the nineteenth century was reliance on the prerogative of mercy as a means of putting right injustice. The Home Secretary had the option of granting a free pardon which amounted to a declaration of innocence and it was felt by most members of Parliament that justice was being done by an 'appeal' to the Home Secretary so a court of criminal appeal was not needed. However, there was much criticism of the procedure adopted by the Home Secretary, and the inadequacies of the Home Office as a mechanism for reviewing convictions were highlighted by the case of Adolf Beck who had been convicted twice for defrauding women when he was mistaken for the real culprit. The Home Office had rejected sixteen attempts by Beck to have his conviction reviewed and the controversy surrounding this case, and a number of other convictions,²⁰ persuaded some politicians that a criminal appeal on matters of fact was urgently needed. Retrial by newspaper had become so prevalent that public confidence in the courts was being undermined and the government responded to mounting pressure with the creation of the Court of Criminal Appeal in the Criminal Appeal Act 1907.

From the Court's creation and up until the 1950s there was a general consensus that the Court was working well with one of the most immediate benefits of the Court's establishment being a noticeable improvement in the standards of the trial courts

¹⁵ The views of the judges can be ascertained from the evidence given in the following reports: Commissioners on Criminal Law (1836), Second Report on the Criminal Law, cmd. 343. (London:HMSO); Commissioners on Criminal Law (1845), Eighth Report on the Criminal Law, Parl. Pap., vol. xiv, 161; House of Lords Select Committee (1848), Report of the Select Committee of the House of Lords on the Administration of the Criminal Law, cmd. 523 (London:HMSO); Royal Commission on the Law Relating to Indictable Offences (1879), Report of the Royal Commission on the Law Relating to Indictable Offences, cmd. 2345. (London:HMSO).

¹⁶ See Select Committee Report (Baron Parke, p.4; Lord Denman CJ, p.44; Lord Brougham, p.49).

¹⁷ *ibid* (Lord Denman CJ, p.45; Lord Brougham, p.49).

¹⁸ *ibid* (Baron Parke, p.8; Lord Brougham, p.49).

¹⁹ *ibid* (Baron Parke, p.5; Baron Alderson, p.10; Lord Brougham, p.8).

²⁰ See Pattenden, 1996, n. 215 on p. 30 for other examples.

(Pattenden, 1996, p. 58; JUSTICE Committee, 1964, para. 13; Seaborne Davies, 1951, p. 427; Knight, 1970, p.1). As Malleson has argued (1996, p.128), a possible reason for the lack of criticism expressed during these first fifty years is 'appeal fatigue' which had been caused by the effort of finally establishing the Court. The very existence of the Court represented such an improvement on the previous situation that there was not the impetus to tackle the areas in which the Court was felt to be inadequate. Another possible factor for the lack of criticism is the absence of a perceived crisis, as during this period there was a distinct lack of any high profile miscarriages of justice. However, once the novelty of having a Court of Criminal Appeal began to wear off, the Court's practices began to be viewed more critically.

The main difficulties associated with the Court have stemmed from its function in deciding appeals on factual grounds where, at its most simplistic level, the appellant is arguing the jury made a mistake and he or she was wrongly convicted. A major difficulty is identifying the source of the problem as it is not clear whether it is the legislation that has caused the problems or whether the problems are caused by the Court's interpretation of the legislation. The general consensus is that it is the latter with the Court adopting a restrictive approach to its role of correcting miscarriages of justice (Pattenden, 1996, p. 77; Nobles and Schiff, 2000, p. 83; Malleson, 1994, p. 163; Thomas, 1966, p. 42; Justice, 1964, p. 22; RCCJ, 1993, ch.10, para.3; Justice 1989, para. 4.21; Friedland, 1969, p. 234; Williams, 1963, p. 330; Samuels, 1984, p. 337; Knight, 1970, p. 1; Woffenden, 1987, p. 323; Spencer, 1982, p. 264). This, in turn, has led to its inconsistent and unpredictable decision making. Two main interlinked reasons have been suggested as to why this has occurred, which are that the Court has shown undue reverence to the jury verdict and shown undue reverence to the principle of finality. There is also a third reason which is the problem of resources

Although these two main interlinked reasons have been deemed responsible for the Court's problematic approach to errors of fact, the Court has also been criticised for its approach to procedural irregularity appeals. The cases Naughton deems 'exceptional' only reach that status when they have been through the appeal process and failed and have to be referred back to the Court for a second try. Therefore, the 'exceptional' appellant will previously have had an appeal fail. This is important as the appellant's first appeal tends to be based on a procedural irregularity. The reasons for this are obvious in that there is a 28 day time limit on which to appeal after conviction. This really only leaves time for the pre-trial and trial process to be reviewed for error, as locating new evidence is more problematic in that time frame. This study examines why these first appeals may be unsuccessful, necessitating a return to the Court a number of times before the appeal is successful. These difficulties apply to not only the factually innocent appellant but may also apply to the factually guilty appellant. Whilst the factually guilty

appellant may not have the same resonance with the media and the public as the factually innocent one, both have been deserving of overturned convictions according to legal system discourse.

The Criminal Division of the Court of Appeal represents a very small fraction of the work of the criminal courts in England and Wales and as such is an often neglected area in terms of law reform and empirical research. Although much has been written about criminal appeals since the Court was created, only a very small amount has actually been based on empirical evidence. There have only been four major studies conducted using the judgments of the Court, with the first three using only the reported judgments (Ross 1911, Seaborne-Davies 1949, Knight 1970 and Malleson 1993). The last study was conducted over fifteen years ago by Kate Malleson for the Royal Commission on Criminal Justice (hereinafter RCCJ) prior to the enactment of the Criminal Appeal Act 1995. Recent empirical research is required in order to determine what the current practice of the Court is and to determine whether the Criminal Appeal Act 1995 has had any effect on the working practices of the Court. The empirical research I have conducted on the judgments of the Court forms the basis of this study. The methodology used to conduct the research is outlined in chapter two. In order to illustrate why empirical research is required, it is necessary to outline the various powers the Court of Appeal has been given and the background to the Criminal Appeal Act (CAA) 1995.

Powers of the Court of Appeal

The statutory powers the Court has been given have been fairly wide. These powers will be analysed in detail during the course of this thesis but for the purposes of this chapter it is necessary to outline the powers prior to the CAA 1995 briefly in order to see how the powers have changed. This provides an insight into what the changes were in the CAA 1995 and the reasons for those changes.

In the CAA 1907, section four authorised the Court to allow the appeal:

'if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice.'

There was also a proviso to this section which allowed the Court to dismiss the appeal if they considered that no miscarriage of justice had actually occurred.²¹ Under section nine of the CAA 1907, the Court had wide powers to adduce fresh evidence and could

²¹ 'Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.'

order the production of documents, exhibits or any other thing connected with the proceedings 'if they think it necessary in the interests of justice.'

Under the CAA 1968, the Court of Appeal had the following power to quash a conviction:

S.2(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think--
(a) that the [conviction]²² should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
(c) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal.

The proviso still applied to this section but the word 'substantial' had been deleted. Section 23 gave the Court a discretionary power to admit fresh evidence and a duty to admit it if likely to be credible, admissible at the trial on an issue which was the subject of the appeal and if there was a reasonable explanation for the failure to adduce it at the original trial.

The Court interpreted its new 'unsafe and unsatisfactory' ground in *R v Cooper*²³ where Lord Widgery CJ created the 'lurking doubt' ground of appeal. He stated

'....in cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.'

The Court also has the power to order a retrial which was initially given in fresh evidence cases only²⁴ but is now a general power²⁵ and can be ordered only after the Court has quashed the conviction.²⁶ The Court also has the power to substitute an alternative offence under section 3 of the CAA 1968 as amended by section 316 of the Criminal Justice Act (CJA) 2003. Section 3 applies where the appellant has pleaded not guilty and a new section 3A inserted by the CJA applies where the appellant has pleaded guilty. The Court also has a further power under section 6 of the CAA 1968 to substitute a verdict of not guilty by reason of insanity on the advice of two or more registered practitioners.

²² The original provision in the CAA 1968 stated that the 'verdict of the jury should be set aside' but this was changed to 'conviction' by section 44 of the Criminal Law Act 1977 to allow the Court to quash a conviction where the appellant had pled guilty at trial.

²³ (1969) 53 Cr. App. R. 82.

²⁴ Section 1(1) Criminal Appeal Act 1964.

²⁵ Section 43 Criminal Justice Act 1988.

²⁶ Section 7(1) Criminal Appeal Act 1968.

The current test for quashing convictions is in the CAA 1995 which amended the Court's powers in the CAA 1968. The Court's amended powers will be discussed after the background to the CAA 1995 has been outlined.

Background to the Criminal Appeal Act 1995

The catalysts for changing the Court's powers in 1995 proved to be the cases of the Guildford Four and the Birmingham Six. The Guildford Four had been convicted in 1975 of five murders resulting from the Guildford and Woolwich pub bombings. They had appealed in 1977 when convicted IRA terrorists admitted to carrying out the bombings. That appeal failed but as a result of intense public pressure during the 1980s, the Home Secretary referred their case back to the Court of Appeal in 1989 and the convictions were quashed when the Director of Public Prosecutions stated that the Crown no longer sought to maintain them. This was because new evidence had come to light which showed that their confessions to the crimes had been fabricated. The Birmingham Six were also convicted in 1975 but of the Birmingham pub bombings. They had also confessed to the crimes but there was also forensic evidence that they had handled explosives. They appealed in 1976 but the appeal was dismissed and their case was referred to the Court of Appeal in 1988 which also failed. As a result of pressure, which had intensified after the release of the Guildford Four, the case was referred again by David Waddington, the then Home Secretary, as new evidence had emerged that the police statements had been tampered with and also the forensic evidence had been discredited. Once again the Director of Public Prosecutions stated that the Crown no longer sought to maintain the convictions however the Court then decided it would decide the issue for itself and after a full appeal hearing, the convictions were quashed.²⁷

The RCCJ was set up on the day the Birmingham Six were freed with the aim of proposing reforms to the appeal process which would restore public confidence in the ability of the criminal justice system to identify and correct miscarriages of justice. But although the RCCJ was set up as a direct response to the perceived crisis in the appeal process, the terms of reference did not just relate to the appeal and post appeal process but included the whole criminal justice system. Initially the terms of reference with regard to the appeal process were very narrow and were just 'the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations' (RCCJ, 1993, Ch. 10). However, the Commission extended this view to consider all of the Court's powers and practices, stating that it had not confined itself to the issues set out in the terms of reference since they could not be readily separated from the role of the Court of Appeal in hearing appeals against conviction in general (RCCJ, 1993, Ch. 10).

²⁷ For details of the cases, see Woffenden (1987).

The RCCJ discussed the test the Court had been given in section 2(1) of the CAA 1968. They stated that much of the difficulty in deciding which ground the Court of Appeal was applying under section 2(1) seemed to be due to the confusing way the section was drafted and the Court seldom seemed to distinguish between 'unsafe' and 'unsatisfactory.' The Commission doubted whether there was any real difference between the two. They stated that either of the grounds set out in paragraphs (b) and (c) – the error of law or a material irregularity during the course of the trial, may cause the Court to think that the original conviction was unsafe and unsatisfactory. Thus there was an overlap between the three grounds of appeal (ch. 10, para. 29).

The RCCJ also stated that there was potential confusion as to the scope of the proviso. They stated that its use may be appropriate where there was a material irregularity during the course of the trial but the wording seemed difficult to reconcile with the unsafe and unsatisfactory ground or the wrong decision on a question of law ground. They stated that it seemed from the decided cases that the court did consider whether the unsatisfactory nature of a conviction under either of those two grounds is nevertheless outweighed by the consideration that no miscarriage of justice appears to have occurred (ch. 10, para.30).

The majority of the RCCJ recommended that the grounds should be redrafted to a single ground of appeal. This single ground was whether a conviction 'is or may be unsafe.' Where the court is satisfied that the conviction is unsafe it should allow the appeal, but were the court to feel it may be unsafe then it should quash the conviction but order a retrial unless a retrial was not possible. The majority saw no need for the proviso because if the court was not convinced the conviction 'is or may be unsafe' it simply dismisses the appeal (ch. 10, para. 32). The RCCJ, therefore, recommended the proviso be abolished.

In response to the RCCJ, the Government issued a consultation paper in 1994 (Home Office, 1994). The paper stated that in considering reforming the Court of Appeal, the Government had three policy objectives which were, firstly, convictions which could not be considered safe should be quashed leaving those which are safe to stand; secondly, there must be arrangements to ensure that doubts about the safety of the conviction could be considered and resolved at the earliest opportunity as 'it would be a mark of failure in the system of criminal justice if a substantial number of cases needed to be considered by the courts on more than one occasion'; thirdly, to ensure consistency of approach in criminal proceedings so that the final decision on whether or not a conviction should stand is in all cases taken by the courts (para.4). The Government felt

that the RCCJ's recommendations would provide a 'sound basis for change which will ensure that these objectives are achieved.'

The overall response by the Government to the proposals for the Court of Appeal was:

'The Government is inclined to support the Royal Commission's general prescription for reform of the Court of Appeal, which it believes reflects to a large extent the Court's own developing response to unsafe in recent years' (para.18).

The Criminal Appeal Bill was introduced into the Commons by the then Home Secretary, Michael Howard. On the subject of the amendments to the grounds of appeal, he stated:

'The present formula involves three overlapping grounds and is widely felt to cause confusion. Under the Bill, the Court of Appeal will allow any appeal where it considers the conviction unsafe and will dismiss it in any other case. That simple test clarifies the terms of the existing law. In substance, it restates the existing practice of the Court of Appeal and I am pleased to note that the Lord Chief Justice has already welcomed it.'²⁸

This declaration that the Bill was simply restating the existing practice of the Court was because in the early 1990s it was felt that the Court of Appeal was adopting a liberal approach to quashing convictions evidenced by the Guildford Four and Birmingham Six's successful appeals. The Court also appeared to be more willing to order retrials, which was taken to be part of the Court's so-called liberal phase. So as Nobles and Schiff note 'the problem facing Parliament was to devise a form of words which ensured that the Court would continue to do what it was (apparently) already doing' (Nobles and Schiff, 2000, p. 86).

The Bill was generally well received in the Commons. There was agreement that there had been a change of attitude by the Court of Appeal during the early 1990s. Although the provisions in the 1995 Bill were the result of recommendations by the RCCJ, the Government had not adopted the full test for quashing convictions as set out in the RCCJ report. The Government had rejected the words 'is or may be unsafe,' preferring the test to be simply 'is unsafe.' There was some disquiet over this and during the Standing Committee stage of the Bill in the Commons, there was an amendment to the Bill to insert the words 'is or may be unsafe' to give legislative effect to the RCCJ's recommendation.²⁹ The reason for not implementing the full recommendation of the RCCJ was given by David Maclean, Minister of State for the Home Office, as 'the Royal Commission's formula goes wider than the current practice of the Court of Appeal and

²⁸ *H.C. Debs*, 6 March 1995, col. 24. Similarly the Minister of State for the Home Department, David Maclean, had stated 'the Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought, and they believe that the new test restates the existing practice of the Court of Appeal.' *Ibid*, col. 110.

²⁹ *HC Debs*, Standing Committee B, Criminal Appeal Bill, 21 March 1995, col. 8.

was, on examination, found to be uncertain in its effect.' Though, he was keen to point out that 'I can assure the House that it does not narrow the grounds for allowing an appeal.'³⁰

During the second reading in the Lords, the Lord Chief Justice, Lord Taylor, who had been largely credited with bringing about a change of attitude in the Court of Appeal at that time, gave his support for the Bill and stated that 'in doing so I speak not only for myself but with the concurrence of a group of senior judges with great experience both in the practice of criminal law and in the Criminal Division of the Court of Appeal whom I consulted on both the policy of the Bill and its detailed provisions.'³¹ On the subject of the new test for quashing convictions he stated:

'The new test will, in my view, be concise, just and comprehensible to the ordinary citizen without narrowing the present grounds of appeal. It will assist the Court of Appeal and those who appear before it. And it will help appellants to understand more readily what is at stake and the reason for the court's decision.....there is no merit in including in the test the words 'is or may be unsafe' since the implication of doubt is already inherent in the word 'unsafe.' A conviction which may be unsafe, is unsafe.'³²

The Criminal Appeal Bill received royal assent on 19 July 1995, and the sections of the Act dealing with the Court of Appeal came into force on 1 January 1996. The new statutory test for quashing convictions was set out in section 2 of the Act which stated that the Court of Appeal (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case. The proviso was now repealed as it was considered not necessary under the amended test.

Research conducted for this thesis

There have been suggestions from the academic literature that the test introduced by the CAA 1995 may have resulted in the Court adopting a more restrictive approach than the RCCJ envisaged.³³ Therefore, empirical research may shed light on whether amending the Court's power to quash convictions had any effect on the decision making process of the Court. The paradox in conducting research on this issue is that, as indicated above, during the debates on the Criminal Appeal Bill there was a recurrent theme that the new test was simply to restate the existing practice of the Court of Appeal. But there was obviously potential for the new test to bring about some change as the object of the RCCJ's recommendations had been to restore public confidence in the criminal justice system. Whilst it is very difficult to prove whether public confidence

³⁰ *Ibid*, cols. 109-10.

³¹ *Ibid*, col. 311.

³² *Id*.

³³ See, for example, Wadham and Missen (1995); Nobles and Schiff (1996); Smith (1995a) and (1995b).

was restored, it is possible to conduct research in order to gain an indication of whether the new test encapsulated or changed the Court's approach to its task.

As well as conducting research on the 'unsafe' test, empirical research is also required in order to examine the Court's approach to fresh evidence appeals as the powers of the Court were also amended in the CAA 1995 in this area. Under section 23(1) of the CAA 1968, the Court had a general discretion to admit fresh evidence 'if they think it necessary or expedient in the interests of justice.' In addition section 23(2) set out a duty to admit evidence if certain criteria of credibility, relevance, and an adequate explanation for not adducing it at the original trial were fulfilled. Little research has been undertaken to consider fresh evidence appeals, their use and operation. However, the Court has often been criticised for taking a restrictive approach to fresh evidence appeals and this was discussed by the RCCJ.³⁴ It had been suggested to the RCCJ that the test in section 23(2) that the evidence had to be 'likely to be credible' was too high a test and they recommended that the test should be changed to 'capable of belief' as they suggested this would 'be a slightly wider formula giving the court greater scope for doing justice' (ch.10, para. 60).

This intention behind the amendment to section 23 CAA 1968 by the RCCJ to widen the basis upon which fresh evidence would be admitted by the Court of Appeal seemed to be accepted by the Government. In introducing this part of the Criminal Appeal Bill into Parliament, the then Home Secretary stated that 'the Bill also lowers the threshold for the admission of fresh evidence along the lines recommended by the Royal Commission.'³⁵ However, when amendments to section 23 were introduced in the House of Lords, Baroness Blatch, stated that:

'We intend that these amendments should not in any way narrow the scope of the receipt of fresh evidence by the Court of Appeal. We have consulted the Lord Chief Justice about this and we are satisfied that the amendments would not alter the current practice of the court.'³⁶

Therefore, the confusing picture that emerged during the debates on the Criminal Appeal Bill 1995 was that the RCCJ made recommendations with the hope of liberalising the Court's approach to fresh evidence appeals. The Home Secretary seemed to accept that the Court's approach should be liberalised and adopted the RCCJ's recommendations accordingly. But Baroness Blatch seems to be saying that the amendments in the Bill were not intended to alter the then current practice of the Court. This presents a confusing picture as to what the intentions were in the Government

³⁴ The reasons for the Court's restrictive approach to fresh evidence appeals are discussed in more detail in chapters three and five.

³⁵ *Hansard*, H.C. Vol 256, Col 25, 6 March 1995.

³⁶ *Hansard*, H.L. Vol. 565, Col 567, 26 June 1995.

making the changes to the law regarding fresh evidence in the CAA 1995.

The amendments to the fresh evidence provisions were in section four of the CAA 1995 which amended the provisions in section 23 of the CAA 1968. The amendments to section 23 were that the duty to admit new evidence was abolished, but the power to admit new evidence is made subject to a duty to consider the same factors as limited the former duty: credibility, relevance to the safety of the conviction, admissibility at trial and the reasonableness of the explanation for the failure to adduce the evidence at trial. Following the recommendation of the RCCJ, the requirement that new evidence be 'likely to be credible' has now become 'capable of belief.' As under the previous legislation, the Court's power to receive evidence is unfettered, provided it considers it necessary or expedient in the interests of justice to do so regardless of the above factors. The Court's rarely used power to rehear the evidence presented at the trial was also abolished.³⁷ This was criticised by Pattenden who stated 'this can only increase the difficulty for the Criminal Division of the Court of Appeal of deciding whether a conviction is unsafe because of jury error' (Pattenden, 1996, p. 415).

There had been arguments that the 'capable of belief' amendment was merely a cosmetic change. For example, Darbishire points out (1996, p. 487) that under the old legislation 'credible' was held to mean 'well capable of belief'³⁸ and therefore the former test was 'likely to be well capable of belief.' This is replaced by the words 'capable of belief' and Smith argues (1995a) 'how can likely to be capable of belief be a higher test than is capable of belief? It seems to be the other way round.' He stated (1995a, p. 928) that to lower the threshold, the section should have provided 'may possibly be capable of belief (or credible).' Smith went on to say (1995c, p. 573) that section 23 is concerned with the consideration of evidence which has not yet been heard. Therefore, it makes sense to ask the court to consider whether the unheard evidence is 'likely to be credible;' but 'how can the court determine whether the evidence 'is credible' (or capable of belief) before they have heard it?' In his opinion 'the recommendation, and section four seem to be misconceived.'

Empirical research is needed in this area to determine whether the amendments to the fresh evidence provisions have brought about any changes to the Court's approach to these appeals. This study will use the judgments of the Court to determine whether there have been any changes and if so, whether those changes can be attributed to the CAA 1995.

³⁷ Section 4(1)(a) CAA 1995.

³⁸ In the case of *R v Beresford* [1972] 56 Cr. App. R. 143.

Summary

Although the Court of Criminal Appeal was originally created after a series of miscarriages of justice, the main criticism of the Court has been that it has never fulfilled the function intended for it as it has proved to be deficient at identifying and correcting miscarriages of justice. It has also proved to be inconsistent, unpredictable and contradictory. This thesis seeks to find an explanation for these problems and uses empirical research to analyse the Court's decision making process in relation to its powers. The empirical research is used to evaluate the amendments to the Court's powers in the CAA 1995 in relation to 'unsafe' and fresh evidence and to analyse whether those amendments brought about any changes to the Court's practices or whether it did merely 'restate the existing practices of the Court of Appeal.' It will also analyse the Court's retrial power. This thesis will argue that the Court's failures are an inevitable result of the decision making process of the Court, and in particular, its creation and function as a court of review.

In chapter two, the methodology used to conduct the thesis will be outlined.

CHAPTER TWO: METHODOLOGY

This study seeks to use empirical methods to examine the working practices of the criminal division of the Court of Appeal. This study has many of the features that some term a replication study, in that it employs an identical method to that undertaken by Kate Malleon for the research she conducted for the RCCJ (Malleon, 1993).³⁹ Replication studies are used predominantly in the natural sciences, although use is made of them in the social science arena including in psychological and criminological studies.⁴⁰ I have replicated this study with the aim of comparing and contrasting the findings of the two studies to provide an insight into whether there have been any changes to the Court's practices. This may provide an indication of whether the CAA 1995 has made any difference to the Court's approach.

Replication, Verification, Change over Time and Originality

It is legitimate to ask: why replicate a previous study's method? Does this not lead to concerns about originality? Replication studies have some clear benefits over new method studies. Firstly, replication studies permit comparison between the findings of a previous study, and findings with the current study to assist with an examination of change over time. There is always a suspicion that if a new researcher seeks to answer an identical research question, using a different method from the original, then the combination of new researcher and new method may influence the findings to such an extent that any apparent similarities and differences in the findings from the two studies may be dismissed as a function of researcher and method rather than true research findings of change. Triangulation of research findings through the use of different research methods, is an important tool in seeking to confirm previous findings. But, in a situation where a researcher is seeking to look at change over time, it is important to control for as many intervening influences as possible. Consequently, in this study which seeks to compare the situation in 1990 with the situation as at 2002 replication was considered essential.

Secondly, there are concerns that social scientists have tended to see studies in isolation rather than to build on previous studies to consider change, although there is evidence to suggest that replication studies are gaining ground.⁴¹ Interestingly, replication is a working method that most legal professionals, and particularly judges, would consider to be their *modus operandi*. Judges and other legal professionals regularly compare previous cases with current cases and employing a similar method to

³⁹ Professor Kate Malleon has acted as my supervisor for this thesis.

⁴⁰ For a discussion of the use of replication studies in criminology, see for example Hochstetler, A., DeLis, M. & Puhmann, A. (2007).

⁴¹ For a consideration of authenticity and replication see Davies, G., Lloyd-Bostock, S., McCurran, M. & Wilson, C. (1996).

seek to develop legal knowledge and promote consistency of findings, as well as do justice.

There has been some dispute about the method used in these studies in terms of what needs to be replicated in order for it to be a replication study. This debate centres on whether there is a requirement for the use of the exact same data or the exact same method of analysis. There has also been some dispute as to the terminology used, particularly focusing on the differences, if any, between what may be a replication study and what may be a verification study. For the purposes of this thesis it is necessary to outline these debates in order to have a better understanding about the method chosen and the authenticity of the data collected.

King (1995) has argued that

'the most common and scientifically productive method of building on existing research is to replicate an existing finding – to follow the precise path taken by a previous researcher, and then improve on the data or methodology in one way or another.....Reproducing and then extending high-quality existing research is also an extremely useful pedagogical tool' (King, 1995, p. 445).

King claims that replication involves the identical method but not the identical data. He argues that there should be a 'replication standard' whereby 'sufficient information exists with which to understand, evaluate and build upon a prior work if a third party could replicate the results without any additional information from the author' (p. 444). In other words, he argues that the same method be used, rather than the same dataset.

King's definition is contested. Some argue that King is describing 'replication', whereas others argue that King is describing 'verification' rather than replication. Both Herrnson (1995) and Aberbach and Rockman (1995) consider that if you use the same method but generate new data then that is verification rather than replication. Herrnson argues that King 'misstates the meaning of replication' and that 'replication is not the same meaning as reanalysis, verification or secondary analysis' (1995, p. 452). He argues that the four terms have very different meanings:

'A reanalysis studies the same problem as that investigated by the initial investigator; the same data base as that used by the initial investigator may or may not be used. If different, independently collected data are used to study the same problem, the reanalysis is called a replication. If the same data are used, the reanalysis is called a verification. In a secondary analysis, data collected to study one set of problems are used to study a different problem' (1995, p. 452).

Further, Herrnson argues that:

'replication repeats an empirical study in its entirety, including independent data collection. It enables a researcher to comment on whether data used in an original study were collected properly or whether generalizations supported under one set of conditions are also supported under others. Replications increase the amount of information for an empirical research question and increase the level of confidence for a set of empirical generalizations' (1995, p. 452).

In short, were Herrnson's definition to be applied to this study, the study would be described as a verification study, albeit one with a number of new elements to negotiate.

Sniderman (1995) has suggested that rather than debate the terms 'replication' and 'verification' it should be recognised that the term 'replication' can be used in different ways such as:

'Replication in sense 1 involves the use of the same data set, procedures of measurement, and methods of estimation to verify the accuracy of reported results. Replication in sense 2 involves the same data, but not the same methods of measurement or estimation, to confirm the adequacy of the interpretation and reported results. Replication in sense 3 involves the use of a different data set and comparable measurement and estimation procedures, to validate the robustness of both the results initially observed and the interpretation originally given to them' (1995, p. 464).

For the purposes of this study, Sniderman's approach to the definition of replication has been taken. In sum, this study employs an identical method to that adopted by Malleson in her study in order to compare and contrast the findings, with some additional features (discussed later in the chapter). It does not seek to replicate her findings by re-analysing the data she generated, and it does not seek to verify her findings by undertaking a fresh data collection exercise – this would not be possible even if it were desirable, due to the time that has elapsed between her study and this study, and the nature of the changes in the criminal justice system in the intervening period. Instead, it seeks to use a tried and tested research method to examine a fresh situation. The study's claim to originality stems from the examination of the Court of Appeal's *new* powers, and the related analysis of the Court of Appeal's current role, rather than from the method used in their examination.

Data Collection and Data Analysis

The data used as the principal basis for this study is that derived from published and unpublished Court of Appeal judgments. Malleson reviewed the first 300 appeals of 1990, analysing each judgment separately to gather information on the grounds of appeal, the approach of the Court to the case, and the result of the appeal. Where the Court commented on relevant issues such as fresh evidence or the 'lurking doubt' principle, these were recorded in order to obtain both qualitative and quantitative information on the Court's powers and practices. Malleson consequently used a form of

relational content analysis to identify and code key pieces of information from the judgments. The codes were generated from legally defined and legally understood concepts relevant to criminal appeals. It could be said that this is a form of 'legal' content analysis.

Content analysis is a research tool used to determine the presence of certain words or concepts within texts or sets of texts. Researchers quantify and analyse the presence, meanings and relationships of such words and concepts, then make inferences about the messages within the texts.⁴² Relational analysis, like conceptual analysis, begins with the act of identifying concepts present in a given text or set of texts. However, relational analysis seeks to go beyond presence by exploring the relationships between the concepts identified. The focus of relational analysis is to look for semantic, or meaningful, relationships. Individual concepts are viewed as having no inherent meaning. Rather, meaning is a product of the relationships among concepts in a text.⁴³

In methodological terms, Malleson employed relational content analysis using the judgments of the Court. This was done by identifying certain words within the text of the judgment such as 'lurking doubt', 'fresh evidence' and 'retrial.' These concepts were then explored quantitatively (descriptively rather than statistically) and qualitatively, in the form of relational content analysis, in order to provide an in depth analysis of the Court's powers and practices. This relational content analysis has been replicated in this study.

This study followed a pilot phase that is not discussed in this thesis. However, it may assist to provide a brief explanation of this pre-study phase, by way of background to this study. The pilot study was undertaken on the first 300 appeals of 2000 using Malleson's methodology. The pilot study assisted me in honing my method but it was conducted prior to the Human Rights Act coming into force. The decision was taken to conduct the full study in 2002, post the entry into force of the Human Rights Act which has potentially had a significant impact on the working practices of the Court. As the Human Rights Act was not in force at the time of my pilot study, in the interests of data integrity, I considered that it would not have been appropriate to merge the two data sets – the pilot and the full study sets. However, this thesis has the benefit of being founded on a previous study by Malleson, of 300 cases, and a pilot study of 300 cases.

This study reports on findings from a relational content analysis of the first 300 available appeals against conviction which the Court considered in 2002. The transcripts of the

⁴² For a detailed discussion of content analysis, see Carney (1972), Neuendorf (2002), Krippendorff (1980) and Weber (1990).

⁴³ See <http://writing.colostate.edu/guides/research/content/com2b2.cfm>.

appeals were taken from Casetrack.⁴⁴ I accessed the appeals against conviction on a daily basis using the search engine until I had obtained 300 judgments. Some of the transcripts on the database were not available as they were subject to reporting restrictions so where this occurred I accessed the next transcript. The appeals reviewed covered the period from January to May 2002. I adopted the same methodology as Malleson and each judgment was analysed separately and information was gathered on the grounds of appeal, the approach of the Court to the case and the result of the appeal.⁴⁵ The information was coded in such a way so as to permit a descriptive quantitative analysis and a qualitative analysis. It would have been possible to limit the analysis to a descriptive statistical analysis of the first 300 judgments, however, it became apparent in the pilot that there was a rich vein of data that could be mined and analysed in instances where the Court commented on relevant issues and these were recorded in order to obtain information on the Court's powers and practices. I decided to use a mixed method of analysis in the hope that it would capture the richness of the data.

After Malleson's study was replicated, I then used the judgments of the Court of Appeal to discern what the different approaches were that the Court used to determine the appeal. These different approaches were compiled and then the judgments of the Court were divided into these different approaches. This was necessary to determine what those different approaches were in order to analyse the decision making processes of the Court. It was apparent from reading the judgments that the Court used a small number of decision making processes when determining the appeal. I initially compiled two approaches which were apparently being used from reading the literature on the Court (notably Pattenden, 1996). These were what the Court thinks about the ground of appeal and whether it applies the jury impact test which requires the Court to decide the appeal on the basis of what the original jury, or a reasonable jury, would make of the ground of appeal. But it became apparent from reading the judgments, that there were a number of approaches within these two broad overarching processes and these were collated. The judgments of the Court were allocated to one of these approaches which allowed a diagram to be drawn illustrating how the Court decides the appeal. This is discussed in detail in chapter four. The aim in collating the different approaches was to see how the Court approaches its task to try to ascertain why the Court's decision making can be problematic. This allows a relational content analysis to be conducted, which assists in understanding what the problems are and suggesting proposals for reform. This type of research has not been undertaken previously on the judgments of the Court and adds an additional element to the replication of Malleson's study.

⁴⁴ See <http://www.casetrack.com/index.html>. Casetrack is a database and holds the majority of judgments of the Criminal Division of the Court of Appeal from 1996 onwards. There are some judgments which are not available because they are subject to reporting restrictions.

⁴⁵ See the Data Collection Form in Appendix 1

This study has not sought to determine in any reliable statistical terms, whether the CAA 1995 has changed the way in which the Court makes its decision as compared with Malleson's findings in 1990. In order to make such claims, the research would have had to have been constructed in a way that would permit a more sophisticated analysis including the use of multiple regression tests. This form of analysis would have assisted in determining whether other intervening factors between the two studies, such as the introduction of the Human Rights Act, a change in political climate, or a change in senior judges, may have had a greater effect of any perceptible change in Court of Appeal decision making, than the introduction of the CAA 1995 and the change in the test used to determine the lack of safety of the conviction. But, were the study to have focused on an inferential quantitative method, it would not have benefited from the insights provided by the qualitative method that was used in conjunction with a purely descriptive quantitative analysis. This study does provide an indication of the ways in which the Court's decision making has changed since the introduction of the 1995 Act and may serve as a basis for future quantitative analysis that attempts to verify or reject these tentative hypotheses.

Summary

This thesis has used a replication study to conduct research on the Court's judgments to determine what the current practice of the Court is and to analyse the decision making process of the Court. The aims of the research have been twofold, firstly to analyse the judgments quantitatively in order to determine what grounds of appeal are currently being argued and what the most common grounds of appeal are. These findings have been compared to Malleson's findings to provide a broad picture of the current practice of the Court by comparison with her earlier findings. Secondly, research undertaken in addition to the replication study has provided an analysis of the Court's decision making process to determine the approaches the Court uses to decide the appeal. The Court's approaches have been quantified and then analysed qualitatively in order to show how the Court determines the appeal and why the Court's approach can be problematic. These findings indicate that the Court's failures are an inevitable result of the Court's decision making process, and in particular, its function as a court of review.

The next chapter, chapter three, provides a review of the literature to give an in depth picture of the problems associated with the Court. This serves as the foundation for the study, its focus and approach.

CHAPTER THREE: LITERATURE REVIEW

The Court of Criminal Appeal was founded at the start of the twentieth century against a background of public outcry, heated press opinion, high profile individual cases of miscarriages of justice, a Royal Commission, and a public inquiry (Nobles and Schiff, 2000, p.50). This series of events, which culminated in the CAA 1907, bears a striking similarity to the series of events which culminated in the CAA 1995. This Act was enacted at the end of the twentieth century against a background of public outcry, heated press opinion, high profile miscarriages of justice and a Royal Commission. This is not a coincidence; a reading of the history of criminal appeals reveals a recurring theme of crisis and reform. This chapter reviews the literature in order to place the most recent reforms in their historical context. This is necessary in order to assess whether the CAA 1995 has had any impact on the working practices of the Court of Appeal or whether the Act has merely fallen foul of the problems which bedevilled its predecessors in 1907 and 1968.

A review of the literature reveals that the Court's approach to its powers has been driven by two main areas. These are firstly, a reverence to the jury verdict, and secondly, a reverence to the principle of finality. These will now be explored.

Deference to the jury verdict

Historically, the grounds of appeal that have appeared to be the most problematic for the Court are those which involve it in assessing factual issues such as whether the verdict was unreasonable or could not be supported by the evidence, or whether it was unsafe and unsatisfactory, and those where the appellant wishes to adduce fresh evidence or argue there was a 'lurking doubt.' These grounds necessarily involve the Court to some extent trespassing on the role of the jury and the difficulty comes from determining how far the Court is allowed, or should be allowed, to do this. The evidence indicating that the Court has been affected in its approach to these grounds by its deference to the jury verdict is overwhelming.

Ross (Ross 1911) found in his study of the reported cases of the Court's first three years that 'in practice so great has been the regard paid by the Court to trial by jury that cases are extremely rare in which the conviction has been quashed solely on the ground that upon the evidence properly given at the trial the verdict was unreasonable and unsupportable' (p. 88). He stated that it was constantly enunciated by the Court that:

'the jury are pre-eminently judges of the facts to be deduced from the evidence properly presented to them, and it was not intended by the Criminal Appeal Act,

nor is it within the functions of a Court composed as the Court of Appeal that such cases should be practically retried before the Court' (p. 89).

Similarly, Seaborne Davies, who conducted a study of the reported cases of the first forty years of the Court, stated that 'it is worth mentioning the constant insistence by the Court that trial by jury is trial by jury and not trial by the judge. Its decisions on what are the respective provinces of judge and jury are numerous' (Seaborne Davies, 1949, p. 430). Knight's study (Knight, 1970, p. 124) of the reported cases from 1907 to 1966 indicates that even in the earliest cases, the Court reiterated that the jury were the arbiters of questions of fact, and that the appellate Court would only interfere where the verdict of guilty was blatantly wrong. Malleson concluded in her study of the first 300 appeals of 1990 that:

'the court is very concerned that as far as possible the jury's decision should be final and the trial should not come to be seen as an initial skirmish. The Court's anxiety not to undermine the principle of the sovereignty of the jury was referred to directly or indirectly in many of the cases reviewed' (Malleson, 1993, p. 16).

Consequently, there is strong empirical evidence to support the conclusion that the Court was, and at least until the 1990s remains, deferential to the jury's fact finding role. Evidence of deference to the jury verdict has not only come from these empirical studies, but has also come from the various committees and inquiries that have been set up to evaluate the work of the Court in times of crisis. The Tucker Committee was set up in 1954 to consider whether the Court should be given the power to order a retrial and its conclusions were that 'the Court of Appeal have never considered it to be any part of their duty to substitute their verdict for that of the jury or to make use of their supplementary powers to bring about drastic change in a matter fundamental to criminal practice in indictable cases in this country' (Tucker Committee, 1954, paras. 6-7).

In the 1960s, when the Court's perceived restrictive approach to its role was being widely criticised, two committees were set up to evaluate the working practices of the Court. The JUSTICE Committee was set up in 1964 and the Donovan Committee was set up by the Government in 1965; the Donovan Committee's recommendations formed the basis of the reforms of the Court in the CAA 1968. Both committees concluded that the Court only interfered with jury verdicts in the most limited of circumstances. The JUSTICE Committee stated that the restrictive approach of the Court was an 'expression of an attitude of undue reverence for the verdict of the jury' (para. 60).

It would appear that this attitude did not change. In their 1989 report on miscarriages of justice, JUSTICE concluded that (JUSTICE, 1989, para. 4.17):

'.....the common attitude of the Court of Appeal is that where all the discrepancies and weaknesses of the prosecution evidence have been canvassed before the jury, and the judge has summed up fairly and correctly, then it must not interfere with the jury's verdict, as this would amount to a retrial of the merits of the case, which is not its function. Time and again Justice has read counsel's advice on appeal to the effect that, where the summing up has been impeccable and there are no mistakes of law, the Court of Appeal will not substitute its own opinion for that of the jury, however much it may disagree with it, and therefore there are no arguable grounds of appeal' (para. 4.17).

Similarly, it was the conclusion of the RCCJ that 'in its approach to the consideration of appeals against conviction, the Court of Appeal seems to us to have been too heavily influenced by the role of the jury in Crown Court trials' (RCCJ, ch. 10, para. 3). Thus, the weight of evidence points to the Court's deference to the jury's decision making function.

Although the Court's deference to the jury verdict was cited as having a negative affect on its powers to quash convictions on factual issues, conversely, it appeared to have a positive affect on the Court's willingness to quash convictions because there was a wrong decision on a question of law or a material irregularity in the course of the proceedings. Its reluctance to substitute itself for the jury meant that it rarely applied the proviso which allowed the judges to uphold the appeal if they felt there had not been a miscarriage of justice.⁴⁶ The purpose of the proviso was described in an early case as follows: '[it] enables the court to go behind technical slips and do substantial justice'.⁴⁷ The main problem associated with the proviso was the lack of a retrial power in the CAA 1907. The power to order a retrial had been included in twenty-six of the thirty-one Bills introduced before the Court was created, but it was not in the CAA 1907, even though it was the subject of an amendment. It has been argued that it was not included because the Court had been given wide powers under section 9 to receive further evidence, and coupled with the proviso, this would enable the Court, in suitable cases, to virtually re-try the case. Therefore, the power to order a retrial would not be needed. However, the problem the Tucker Committee identified, was that:

'.....being the way the Criminal Appeal Act has worked in practice it was soon found that there were a number of cases in which there had been some irregularity or misdirection at the trial which could not be dismissed as trivial, and it being impossible to apply the proviso, the Court had no alternative but to quash the conviction and enter a verdict of acquittal, although they might feel little doubt of the appellant's guilt' (paras. 6-7).

So the broad picture that began to emerge in the 1960s from the literature was a Court concerned with the judge's direction, evidence and procedure and the occasional point of substantive law rather than the 'merits' of the case. An appellant who could point to a clear misdirection, the wrongful admission or exclusion of evidence or some procedural

⁴⁶ See for example, *R v Dyson* [1908] 2 K.B. 454.

⁴⁷ *R v Meyer* (1908) 1 Cr. App. R. 10.

irregularity, had better prospects of success than the appellant claiming simply that he was innocent and that the jury had come to the wrong decision (Dean, 1966, p. 539).

This attitude did not appear to change. In 1993, a panel of eminent QCs, Peter Thornton, Ann Mallalieu and Anthony Scrivener under the auspices of an 'Independent Civil Liberty Panel on Criminal Justice' looked at the Court of Appeal and heard a wide range of evidence from, amongst others, the Lord Chief Justice, Justice, the Criminal Bar Association, the Bar Council and the Law Society. Their conclusions, in view of the recent miscarriages of justice, were that the Court as currently constituted was adequate at correcting errors of law but inadequate at righting miscarriage of justice wrongs (The Civil Liberties Trust, 1993 para. 1.1).

It has been suggested that there are three main reasons why the Court has shown such deference to the jury verdict. The first is the constitutional reason that defendants should be convicted or acquitted not on the basis of what judges believe but through the judgement of their peers. By finding that the appellant's guilt has not been proved beyond reasonable doubt or is thrown into doubt by fresh evidence the appellate court usurps the jury's function which is to decide issues of fact (Nobles and Schiff, 2000, p. 89; Pattenden, 1996, p. 76; Williams, 1963, p. 330; Thomas, 1966, p. 42; Devlin, 1971, p. 112; Buxton, 1993, p. 71; Justice, 1964, p. 19). This is illustrated by the speech of Lloyd LJ in *R v Mclkenney and Others*⁴⁸ where he defined the role of the Court:

'Rightly or wrongly (we think rightly) trial by jury is the foundation of our criminal justice system. Under jury trial juries not only find the facts; they also apply the law. Since they are not experts in the law, they are directed on the relevant law by the judge. But the task of applying the law to the facts, and so reaching a verdict, belongs to the jury, and the jury alone. Nothing in section two of the Act, or anywhere else obliges or entitles us to say whether we think that the appellant is innocent. This is a point of great constitutional importance. The task of deciding whether a man is guilty falls on the jury. We are concerned solely with the question whether the verdict of the jury can stand.'

Although Lloyd LJ states that the Court is not entitled to say whether it thinks the appellant is innocent, the Court has in various judgments expressed the view that the appellant may be innocent and that a miscarriage of justice had occurred which is illustrative of the Court's inconsistency.⁴⁹

The second main reason for jury deference is the belief that the system of jury trial, if properly followed, would not result in the conviction of innocent persons (Cohen, 1927, p. 154; Thomas, 1966, p. 42; Bar Council, 1992, p.52; Justice, 1989, p. 50). This stems

⁴⁸ (1991) 93 Cr. App. R. 287.

⁴⁹ See for example *R v Fell* [2001] EWCA Crim 696; *R v Ward* [1993] 2 All ER 577; *R v Kelly* [2003] EWCA Crim 2957; *R v Martin C* [2003] EWCA Crim 1246; *R v Mattan* *The Times*, March 5, 1998; *R v Roberts* [1998] EWCA Crim 998; *R v Fergus* (1994) 98 Cr App R 313.

from judicial attitudes prior to the Court's creation as this was generally one of the reasons given by the judges as to why a criminal appeal system based on fact was not needed as discussed in chapter one. The Bar Council has argued that this reason is combined with the belief, widespread amongst the judiciary that the rules of the trial operate in favour of the accused (Bar Council, 1992, p. 54).

The third main reason cited for jury deference is that an appeal is not a rehearing of the witnesses. The jury, who have heard the witnesses, is accordingly supposed to be in a better position to draw inferences than would be the Court who generally just read a transcript of the judge's summing up (Williams, 1963, p. 330; Nobles and Schiff, 2000, p. 89; Pattenden, 1996, p. 76; O'Halloran, 1949, p. 167).

The Court's deference to the jury verdict is not the only perceived problem in relation to the Court of Appeal. It has been argued that it also has an undue reverence for the principle of finality which will now be discussed.

Undue reverence to the principle of finality

One of the reasons given by the judges prior to the Court's creation in order to illustrate why they were against a criminal appeal system based on errors of fact was the need to uphold the principle of finality. Malleon has argued (1994, p. 158) that the principle of finality has been a critical factor in the Court's approach to the review process and helps to explain why judges have so consistently adopted such a restrained and cautious approach. She states that the process of review, more than any other aspect of the judicial process, undermines the key principle of finality as it reminds us that the contested events are capable of review and reinterpretation. It delays the execution of a sentence and undermines the certainty of the original decision by destroying the finality of the original verdict (p. 159).

There was criticism of this by Pattenden (1996, p. 74) who agreed that the willingness of the Court to correct the errors of judges certainly intended to promote consistency and to reduce the likelihood of future appeals but:

'it does not follow from this that the finality principle underlies the [Court's] reluctance to correct errors of fact. A reason which explains (or partly explains) intervention in one situation (procedural or legal irregularity) does not necessarily explain non-intervention in a quite different one (potential error of fact)' (p. 75).

But there is evidence that appears to suggest that the finality doctrine has been a factor that underlies the Court's perceived reluctance to correct errors of fact. This is illustrated by looking at two areas: the reluctance of the Court to admit fresh evidence and the

perceived reluctance of the Home Secretary to refer cases back to the Court after the normal appeal process had been exhausted. These will be considered next.

The reluctance of the Court to admit fresh evidence

Although the Court was given wide powers under section 9 CAA 1907 to adduce fresh evidence, it imposed its own restrictions on the receipt of fresh evidence partly because of its deference to the jury verdict⁵⁰ and partly because it did not want the criminal justice process to be indefinitely prolonged as this would contravene the principle of finality. Pattenden argues that:

‘the Court of Criminal Appeal was afraid that liberal treatment of fresh evidence would encourage counsel to hold evidence back from the trial. The conviction would then be invested with something of a provisional quality. This rationale gives the desire for finality in litigation precedence over the desire to do justice through the courts’ (1996, p. 75).

The restrictions the Court imposed were hurdles transposed from civil cases such as the evidence had to be credible and relevant to the issue of guilt,⁵¹ the evidence had to be admissible,⁵² and the evidence could not have been put before the jury.⁵³

The Court was given the power to order a retrial in fresh evidence cases in the 1964 Criminal Appeal Act. It was the hope of some of those who debated this point in the Commons’ debates on the Bill that it would have the effect of liberalising the Court’s attitude to fresh evidence appeals. Soon after the 1964 Act was enacted, the Donovan Committee heard evidence that the conditions the Court had imposed on the reception of fresh evidence were too narrow. The condition that had caused the most disquiet was the one which stated that additional evidence should not have been available at the original trial. The Committee recommended that additional evidence should be received if it was relevant and credible and there was a reasonable explanation for the failure to place it before the jury (para. 136). These proposals initially became section 5 of the CAA 1966 which was consolidated into section 23 of the CAA 1968.

The judgment of Edmund Davies LJ in *R v Stafford and R v Luvaglio*⁵⁴ in 1968 illustrates how the principle of finality affected the Court’s approach:

‘It is clear that a more liberal attitude than hitherto prevailed was introduced by the provision in section 5 [1966 Act] that the fresh evidence sought to be

⁵⁰ Lord Parker CJ stated in *R v Parks*: ‘It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would in effect be asked to effect a new trial.’ (1962) 46 Cr. App. R. 29, 32.

⁵¹ *R v Dunton* (1908) 1 Cr. App. R. 165.

⁵² *R v Tellett* (1921) 15 Cr. App. R. 159.

⁵³ *R v Jones* (1908) 2 Cr. App. R. 27.

⁵⁴ (1968) 53 Cr. App. R. 1.

introduced *shall* be received unless the court is satisfied upon the grounds specified in the section that it ought to be. Nevertheless, public mischief would ensue and the legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this Court when verdicts are being reviewed. There must be some curbs, the section specifies them, and we proceed to consider the present applications with due regard to them.'

Writing in 1975, Samuels thought (1975, p. 30) that fresh evidence law and practice had been liberalised over the previous decade. However, he felt that the provisions in section 23 of 'likely to be credible' and 'reasonable explanation for failure to adduce' were too vaguely drafted and were too susceptible to narrow or restrictive interpretation. Writing nine years later his conclusions on fresh evidence appeals were that 'the practice of the Court is uncertain, inconsistent and unpredictable' (1984, p. 340).⁵⁵

The condition of section 23(2), which has remained the most problematic is the fourth condition of what constitutes a reasonable explanation for failure to adduce evidence at the trial. It is also the condition which directly relates to the principle of finality. The RCCJ stated that it had been suggested in evidence to them that the Court took an excessively restrictive approach to whether the fresh evidence was available at the trial and whether there was a reasonable explanation for the failure to adduce it (RCCJ, 1993, ch. 10, para. 55). The Commission felt that the Court's powers under section 23 were adequate but the question was whether the Court had construed them too narrowly. The Commission considered that it was understandable that the Court would view fresh evidence with some suspicion and the Court was right not to wish to encourage defendants to think of the Crown Court trial as a practice run. But on the other hand, the Court must be alive to the possibility that the fresh evidence may exonerate the appellant or at least throw some serious doubt on the conviction (ch.10, para. 55). The Commission stated that 'we would urge that in general the court should take a broad, rather than a narrow, approach to them' (ch.10, para. 56). It had been suggested to the Commission that the test in section 23(2) that the evidence had to be 'likely to be credible' was too high a test and they recommended that the test should be changed to 'capable of belief' as this would 'be a slightly wider formula giving the court greater scope for doing justice' (ch.10, para. 60).

The Government accepted the view that if there was a reasonable explanation for the evidence not being adduced at the original trial then the Court should consider the evidence. But 'considers that the Court should continue to have power to exclude evidence where it considers that there is no reasonable explanation' (Home Office, 1994, para. 13). As discussed in chapter one, the Government agreed with the

⁵⁵ This had also been the conclusion of Glanville Williams twenty-one years earlier when he stated 'there are shortcomings in our system of criminal appeal, and one of the greatest is the erratic way in which the court sometimes allows fresh evidence to be given on the appeal and sometimes does not' (Williams, 1963, p. 133).

recommendation of changing 'likely to be credible' to 'capable of belief.' This was given legislative effect in section 4 of the CAA 1995 and these changes will be analysed in chapter five.

The perceived reluctance of the Home Secretary to refer cases back to the Court will now be discussed.

The reluctance of the Home Secretary to refer cases back to the Court

As section 9 of the CAA 1907 gave the Court such wide powers to adduce fresh evidence it was felt at the time of the Court's inception that it would take over the role the Home Secretary had played in reviewing wrongful convictions. The Home Secretary's role in relation to the prerogative of mercy remained untouched by the Act, but the Home Secretary was given an additional power by section 19 which allowed him, on an application for the prerogative of mercy, to refer a case back to the Court for its determination. Section 19 became section 17 of the CAA 1968 which allowed the Home Secretary to refer a case back to the Court 'if he thinks fit.' As far as the principle of finality is concerned, this was problematic because these were cases that had already exhausted the normal appeal process. This, thus, re-opened a case that had been finalised, and thereby prolonged the criminal justice process.

The role of the Home Secretary was essentially reactive so he generally had to be persuaded to refer a case back to the Court of Appeal by a petition from the applicant. The Home Office received approximately 800 petitions per year so as Taylor and Mansfield have stated 'it was vital that an individual petition was clearly written and well drafted to catch the eye of the relevant officials' (Taylor and Mansfield, 1999, p. 231). When the petition arrived at the Home Office, civil servants in its C3 department, who were not legally trained, would look for any new and relevant arguments which had not previously been dealt with by the Court of Appeal. If this evidence was not available then the application would usually be rejected, but if the petition provided grounds for re-examining the case then further investigations could be carried out. Following any re-investigation, if C3 was of the opinion that a miscarriage of justice might have occurred, the matter would then be passed on to the Home Secretary who would then decide whether to refer the case to the Court of Appeal.

It has been argued by Pattenden that the overriding concern of the Home Office since the inception of the reference power had been to uphold the separation of powers. Anything which could be interpreted as interference with the independence of the judiciary or supervision of the judicial system by the Executive had been studiously avoided (Pattenden, 1996, p. 364). As a result of this, the Home Office imposed its own restrictions on the power. These were that the applicant had to have exhausted the

normal appeals process and there had to be new evidence or a new consideration that had not been before the Court of Appeal previously. These criteria were criticised by Sir John May in his inquiry into the Guildford and Woolwich pub bombings and he stated '...the self imposed limits have led the Home Office only to respond to the representations which have been made to it in relation to particular convictions rather than to carry out its own investigations into the circumstances of a particular case' (RCCJ, 1993, ch 11, para. 7). A common explanation for this approach raised in evidence submitted to the RCCJ in 1993 was that the Home Office had neither the necessary commitment nor the resources to undertake a broader role (Malleson, 1995, p. 929). However, this was troubling, given the fact that the Court of Appeal was expected, by some, to take over the Home Secretary's power in this regard, and yet the Home Secretary was acting as a restrictive gate-keeper in relation to referrals back to the Court.

The RCCJ found that between 1981 and 1992 only 64 cases were referred out of around 750 petitions each year. More revealing still was that very few of the cases that the Home Secretary permitted to go to the Court were then unsuccessful. In 1989, every one of the six convictions was quashed and in 1990 every one of the twenty convictions was quashed or sent for retrial (Malet, 1995, p. 716). This was not necessarily viewed in a positive light. Nobles and Schiff have stated that the Home Secretary did not seek to challenge the authority of the Court but, quite the contrary, was dominated by the Court, seeking to anticipate the Court's likely approach and only to refer cases which had a good chance of success (Nobles and Schiff, 1996, p. 579).

Malleson has argued that in quantitative terms the Home Office played a marginal role in the review process. For the majority of those who claimed to be the victim of a miscarriage of justice, the chances of a case being reviewed and referred back were so small as to be almost an irrelevance. This is obscured by the fact that qualitatively, its work was disproportionately serious because of the high-profile nature of the cases it investigated. Almost all the cases it referred back involved serious offences such as murder, and most had received extensive media coverage (Malleson, 1994, p. 155). This is explained by the fact that whether the power of referral was used depended on how effective and successful interested parties and pressure groups were in initially awakening public awareness to a possible miscarriage of justice and then maintaining public concern over a protracted period (Tregilgas-Davey, 1991, p. 715). The Home Affairs Committee reported in 1981 that '...the chances of a petition ultimately being successful might sometimes depend less on its intrinsic merits than on the amount of external support and publicity that it was able to attract' (Sixth Report, 1981-2, para.10).

It has been argued by Pattenden that there had been ill-concealed judicial distaste at the involvement of a politician in this process, and further at the role played by publicity and campaigns in the bringing of cases to the attention of the Home Secretary (Pattenden, 1996, p. 368-369). The need for publicity and campaigns to secure a reference was very unfair to those wrongly convicted persons who were unable to attract the attention of journalists or people of influence.

As a result of these criticisms, calls began as early as the 1970s to set up an independent tribunal and continued throughout the 1980s (Devlin Report, 1976; Sixth Report of the Home Affairs Committee, 1981-82; Justice, 1989, para. 5.19; Civil Liberties Trust, 1993, para. 1.1; Bar Council, 1992, p. 54). The catalysts for change proved to be the cases of the Guildford Four and the Birmingham Six as discussed in chapter one. The RCCJ reviewed the post-appeal process in relation to 'the arrangements for considering and investigating allegations of miscarriages of justice.' The Commission acknowledged that only a small percentage of cases ended in a reference by the Home Secretary and a rigorous sifting process was applied.

The Commission stated that almost all of those who gave evidence to them argued that arrangements should be changed with the responsibility for reopening cases being removed from the Home Secretary and transferred to a body independent of Government. The Commission agreed there was a 'strong case for change' and recommended that the Home Secretary's power to refer cases back to the Court of Appeal under section 17 be removed and that a new body should be set up to consider alleged miscarriages of justice, to supervise their investigation if further inquiries were needed, and to refer appropriate cases to the Court of Appeal. This recommendation was accepted by the Government and after a report issued by JUSTICE on how it could be set up (JUSTICE, 1994a), the Criminal Cases Review Commission (CCRC) was created by the Criminal Appeal Act 1995 and began work on 1 April 1997. The work of the CCRC specifically is outside the scope of this thesis which focuses on the powers of the Court of Appeal. Under section 9(2) of the Criminal Appeal Act 1995, a reference by the CCRC is to be treated in the same way as any other appeal so the Court uses the same powers to determine all appeals. Therefore, this thesis focuses on the Court's decision making process generally rather than looking at CCRC referrals specifically.⁵⁶ However, the fact that the CCRC is a new addition to the criminal justice system marks out this study as distinct from Malleson's and those that preceded hers.

⁵⁶ For recent studies on the relationship between the CCRC and the Court of Appeal, see McCartney, C and Walker, C (2008); Nobles, R and Schiff, D (2005) with Graham Zellick's response (Chairman of the CCRC) Zellick, G (2005); Nobles, R and Schiff, D (2008); Elks, L (2008). Elks was a former Commissioner of the CCRC.

Even the most ardent miscarriages of justice campaigners have recognised the need for finality in the criminal justice process. For example, the campaigning journalist Bob Woffenden recognises the need for finality to avoid criminal justice deteriorating into a process in which repeated tribunals reassess the same issues which he admits would be 'self-defeating, impractical, and also absurdly expensive' (Woffenden, 1987, p. 322). He accepts the fear that an appellate body that failed to place restrictions on the cases it was willing to reassess would be overwhelmed. He also sees the danger that defence lawyers would treat a trial as a mere rehearsal of their 'full' case. But he then goes on to say that it is 'nevertheless unpardonable that appeal judges have allowed such considerations an overriding importance, with the result that the channels of judicial review have effectively been sealed' (p. 340-1).

A second campaigning journalist, Peter Hill (Hill, 1996, p. 1553) has also recognised that 'the reputation of any legal system depends on its ability to produce finality.' However, he also states that the Court has relied largely on its authority to produce finality, rather than the wisdom of its judgments. Hill states that to achieve finality there must be a more serious and thorough re-investigation than cases are thoroughly subjected to, coupled with a change of attitude towards the trial process; he says that finality in some cases may have to be the result of a longer process than a simple trial and 'inevitably such a process will need to be more inquisitorial than adversarial.'

The large numbers applying to the CCRC would seem to suggest that the Court is not particularly effective at promoting finality as these are cases that have largely been through the appeal process and failed. Therefore, whilst the Court may assume that its approach is conducive to promoting finality, the difficulties of its decision making process may actually prolong the process for many appellants who have to keep returning to the Court before they are successful. This is discussed in more detail below.

Statute or attitude?

As discussed above, the academic consensus appears to suggest that the Court's approach to the jury and finality has resulted in it taking a restrictive approach to its role of correcting miscarriages of justice. This criticism centres round whether the Court is too reluctant to quash convictions and the academic consensus appears to suggest that it is. The fact that the Court appeared initially to be given wide powers under statute to quash convictions and hear new evidence and applied its own narrow parameters is potentially evidence that the Court has been too restrictive in its role.

But whilst the academic consensus appears to suggest that the Court is too reluctant to quash convictions, it is difficult to measure in any meaningful way whether the Court should be quashing more convictions. It is not every appeal that should be overturned

and the Court needs to find some way of differentiating between those appeals which are without merit from those that require the quashing of the conviction. In doing so, the Court has to take account of the role of the jury and the principle of finality and weigh that against the merits of quashing the conviction. Whilst the academic consensus may suggest that the Court's approach to finality and deference leads it to be restrictive, the literature does not provide a gauge by which this should be measured. This problem is summed up by Pattenden:

'What is more important: upholding convictions, or minimizing miscarriages of justice? In a democratic state this important policy question is a matter for Parliament. The CACD [Court of Appeal Criminal Division] is like a broken compass which swings erratically between North and South. Until the CACD's orientation is settled there will be no proper yardstick against which to measure its performance' (Pattenden, 1996, p. 210).

The difficulty Pattenden alludes to is inevitable given the complexity of the role of the Court of Appeal. The balancing exercises the Court has to perform can be illustrated by looking at the criteria for a good criminal appellate system as identified by Sir Robin Auld in his Review of the Criminal Courts (Auld, 2001, ch 12, para 2). They are:

'It should do justice to individual defendants and to the public as represented principally by the prosecution; it should bring finality to the criminal process, subject to the need to safeguard either side from clear and serious injustice and such as would damage the integrity of the criminal justice system; it should be readily accessible, consistently with a proper balance of the interest of individual defendants and that of the public; it should be clear and simple in its structures and procedures; it should be efficient and effective in its use of judges and other resources in righting injustice and in declaring and applying the law, and it should be speedy.'

Whilst its structures and procedures can be assessed for clarity and simplicity, and the speed by which it hears appeals can be measured, defining bench marks by which the other criteria can be measured is very difficult.

There is one method though by which its performance can be measured and that is in the number of appeals that are quashed after an appeal has previously failed. As discussed in chapter one, the Court is often criticised for perpetuating miscarriages of justice by not rectifying wrongful convictions at the first opportunity; for example, the Guildford Four convictions were quashed on the second appeal and the Birmingham Six convictions were quashed on the third appeal. The most extreme example of this is the case of *R v Cooper and McMahon*⁵⁷ which took six appeals before the conviction was finally quashed but by then both had died. The fact that these appeals need to return to the Court potentially shows the Court's failings in not recognising the merits of the initial

⁵⁷ [2003] EWCA Crim 225

appeal. Therefore, the number of convictions quashed after a CCRC referral could be used as quantitative evidence of the Court's restrictive approach. The CCRC's figures show that as of 31 July 2009, there have been 437 referrals with 397 appeals heard by the Court of Appeal and 280 quashed, 116 upheld and 1 reserved.⁵⁸ Whilst not all of the 280 convictions quashed would have previously failed, a large number of them would have; it states on the CCRC website that 'we will almost certainly turn you down if you have not already appealed.'⁵⁹

If we are using the number of failed appeals that are consequently overturned to measure the Court's performance then we do potentially have evidence that the Court has been restrictive in those appeals. The fact that the appeal was overturned after a previous appeal failed is potentially evidence of the failings of the appellate process to rectify the miscarriage of justice at the first opportunity. This potentially shows the appeal court being a part of the problem of miscarriages of justice as well as being the solution as outlined by Savage et al in chapter one.⁶⁰ These appeals are the exceptional appeals Naughton identifies in chapter one as being those that miscarriage of justice discourse tends to focus on. This is because these appeals are considered to be 'true' miscarriages of justice in the sense that every part of the criminal justice system has failed, including the appellate process. These appellants also tend to have more resonance as factually innocent appellants who may have spent many years in prison for crimes they have not committed. Therefore, these appeals tend to be used to argue for changes to the Court's powers as they can be cited as evidence of a restrictive approach. However, as Naughton identifies, they are rare appeals and the counter argument to citing these appeals as evidence of a restrictive approach is that arguments made at the first appeal may have been without merit and it was only the finding of new argument or evidence which persuaded the Court to quash the conviction subsequently. This could be due to a number of reasons such as changes in the law, new witnesses being found or developments in scientific evidence. These would all potentially strengthen the subsequent appeal and lead to the conviction being overturned where it had previously failed. But despite the problems of defining a bench mark by which to measure the Court's performance, and the difficulties associated with the 'exceptional' appeals, this thesis will adopt the view that the consensus is largely correct in citing the Court being too restrictive in its role of correcting miscarriages of justice.

The approach the Court has taken to appeals can be traced back to the Court's origins, which potentially explains where the difficulties and contradictions associated with the Court may have come from. The creation of the Court was not only innovative in terms of creating a criminal appeal system for errors of fact, it was also innovative in creating a

⁵⁸ Figures taken from the CCRC website, http://www.ccr.gov.uk/cases/case_44.htm.

⁵⁹ See http://www.ccr.gov.uk/applying/applying_37.htm.

⁶⁰ See page 13.

court of review as a mechanism for determining appeals. When the Court was created, appeals to the Court of Appeal in civil cases and appeals from magistrates' courts in criminal cases both involved a form of rehearing. However, the terms 'review' and 'rehearing' have not been used consistently in law and consequently it has been necessary for the purposes of this study to define what these terms mean.

Since the Summary Act 1879, appeals from the magistrates' court have been by way of 'rehearing'.⁶¹ This means the appeal is heard *de novo* in the Crown Court and the procedure is the same as that for a summary trial. The parties are not limited to, or bound to call all the evidence called before the magistrates' court and additional evidence may be freely admitted on appeal. The Crown Court may reverse, affirm or amend the magistrates' decision, or may remit the matter back to them giving its opinion for its disposal.⁶² It may also consider points of law as well as decide matters of fact and may impose its own sentence, though not one greater than the magistrates could have passed.

From the Judicature Acts 1873-75 and up until the Civil Procedure Rules 1998, appeals to the Court of Appeal in civil cases were also a 'rehearing' (Jacob, 1987, p. 232; D. di Mambro, 1999, p. 493; Jolowicz, 2000, p. 276; Spencer, 1989, p. 91).⁶³ However, this term was deceptive in that the Court would not rehear all the evidence and the witnesses, as in appeals from magistrates' courts, but would rather perform a review of all the evidence including the transcripts of the witnesses. Further evidence on questions of fact that had occurred after the date of the trial could be adduced but restrictions were imposed on further evidence relating to matters that had occurred before the judgment.⁶⁴ Andrews has stated that 'the reason for this restriction is obvious. In the interests of finality, directness and economy, the hearing at first instance should be the only opportunity to delve into matters of primary fact' (2003, p. 908) This is reinforced by the distinction the Court of Appeal (Civil Division) draws between the primary facts found by the judge in the lower court and the inferences that can be drawn from them.

The Court of Appeal (Civil Division) rarely rejects a finding by a trial judge of specific or primary facts, especially when the finding is based on the credibility or bearing of a witness. However, as a result of the Civil Division's powers to draw inferences from facts,⁶⁵ it is willing to form an independent opinion of the proper inferences to be drawn

⁶¹ Section 19, and reaffirmed by section 79(3) of the Supreme Court Act 1981.

⁶² Supreme Court Act 1981, section 48.

⁶³ R.S.C. Ord. 59, r. 3.

⁶⁴ R.S.C. Ord. 59 r10 stated that no such further evidence shall be admitted 'except on special grounds.' The common law has also provided restrictions which are that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; the evidence must be such that it would probably have an important influence on the result of the case and it must be credible offence. See *Ladd v Marshall* [1954] 1 WLR 1489; *Skone v Skone* [1971] 1 WLR 812; *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153.

⁶⁵ R.S.C. Ord 59 r 10.

from the specific or primary facts found by the trial judge (Jacob 1987, p. 234). In *Saunders v Adderley*, the Privy Council stated:

'It is well established that an appellate court should not disturb the findings of fact of the trial judge when his findings depend upon his assessment of the credibility of the witnesses which he has had the advantage of seeing and hearing – an advantage denied to the appellate court. However, when the question is what inferences are to be drawn from specific facts an appellate court is in as good a position to evaluate the evidence as the trial judge.'⁶⁶

The burden of showing that a trial judge was wrong in a finding of fact lies on the appellant and if the Court of Appeal is not satisfied that he was wrong, the appeal will be dismissed.⁶⁷ This will be more difficult where the finding of fact depends on the assessment of the credibility of witnesses, although the Civil Division of the Court of Appeal has been empowered to reach its own conclusions based on the evidence. In *Coghlan v Cumberland*,⁶⁸ Sir Nathaniel Lindley M.R. stated:

'Even where....the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge, with such materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong.'

In 1996, the Bowman Committee, (Bowman Committee, 1997) was set up to carry out a full review of the Civil Division of the Court of Appeal because of an increasing number of applications and appeals which had resulted in long delays in the hearing of appeals. The recommendations they made were 'to ensure that the Civil Division deals with cases of an appropriate weight for a Court consisting of senior and very experienced judges' and 'to improve the way the Civil Division works so that it can deal with its caseload more quickly.' As a result of these recommendations and Lord Woolf's Access to Justice report, amendments were made to the role and powers of the Civil Division of the Court (see Nobles and Schiff, 2002, p. 676, 684-689).

Under the Civil Procedure Rules, every civil appeal will now be limited to a 'review' of the decision of the lower court unless a practice direction makes different provision for a particular category of appeal, or unless the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing.⁶⁹ The appeal court still has the power to draw any inference of fact it considers justified on the

⁶⁶ *Sir John Balcombe, Saunders v Adderley* [1999] 1 WLR 884, 889, citing *Dominion Trust Co v New York Insurance Co* [1919] AC 254; *Benmax v Austin Motor Co Ltd* [1955] 1 AC 370; *Whitehouse v Jordan* [1981] 1 WLR 246. See Andrews, 2003, p. 907.

⁶⁷ *Norman v King* [1946] 1 All ER 339.

⁶⁸ [1898] 1 Ch. 704.

⁶⁹ CPR, r 52.11(1).

evidence⁷⁰ but unless it orders otherwise, the appeal court will not receive oral evidence or evidence which was not before the lower court.⁷¹ The appeal court will only allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.⁷² In assessing these changes, Brook LJ in *Tanfern Ltd v Cameron-MacDonald* stated 'under the new practice, the decision of the lower court will attract much greater significance. The appeal court's duty is now limited to a review of that decision, and it may only interfere in the quite limited circumstances set out in CPR, r 52.11(3).'⁷³ Although the changes that the Civil Procedure Rules have brought about are more restrictive than previously, in terms of limiting the majority of appeals to a review of the trial judge's decision and only allowing oral evidence and new evidence in very limited circumstances, the general powers of the Civil Division remain wide and extensive. It has all the powers of the lower court⁷⁴ and it has the power to affirm, set aside or vary any order or judgment made or given by the lower court⁷⁵ including the power to order a new trial or hearing.⁷⁶

In contrast to appeals from magistrates' courts and appeals to the Civil Division of the Court of Appeal, the role and powers of the Criminal Division of the Court of Appeal are much more limited. This is illustrated by the speech of Lord Tucker in the Privy Council judgment of *Aladesuru v The Queen*⁷⁷ in 1955, where he compared the civil and criminal systems of appeal:

'It has long been established that the appeal is not by way of rehearing as in civil appeals from a judge sitting alone, but it is a limited appeal that precludes the court from reviewing the evidence and making its own evaluation thereof.'

And Lloyd LJ in *R v Mcllkenney and others*⁷⁸ in 1991 further explained:

'Like the criminal division, the civil division is also a creature of statute. But its powers are much wider. A civil appeal is by way of rehearing of the whole case. So the court is concerned with fact as well as law. It is true the court does not rehear the witnesses. But it reads their evidence. It follows that in a civil case the Court of Appeal may take a different view of the facts from the court below. In a criminal case this is not possible. Since justice is as much concerned with the conviction of the guilty as the acquittal of the innocent, and the task of convicting the guilty belongs constitutionally to the jury, not to us, the role of the criminal division of the Court of Appeal is necessarily limited. Hence it is true to say that whereas the civil division of the Court of Appeal has appellate

⁷⁰ CPR, r 52.11(4).

⁷¹ CPR, r 52.11(2).

⁷² CPR, r 52.11(3).

⁷³ [2000] 1 WLR 1311, 1317. See the House of Lords decision of *Barber v Somerset County Council* [2004] UKHL 13 for a conflicting decision on the role of the appeal court in terms of the circumstances in which it may interfere with the ruling of a trial judge.

⁷⁴ CPR, r 52.10(1).

⁷⁵ CPR, r 52.10(2)(a).

⁷⁶ CPR, r 52.10(2)(c).

⁷⁷ 39 Cr App R 184, 185.

⁷⁸ (1991) 93 Cr App R 287, 311.

jurisdiction in the full sense, the criminal division is perhaps more accurately described as a court of review.'

The Justice Committee in 1964 acknowledged that 'the court was not set up to re-try cases, but to ensure that the due forms of trial were properly observed' (Justice, 1964, 22). Leigh has stated that 'the function of the Court is not to substitute itself for the jury but to decide whether the verdict is one which a properly instructed jury, acting judicially, could reasonably have rendered' (Leigh, 1977, p.526). Similarly, Blom-Cooper has stated that 'the Court of Appeal cannot substitute itself for the jury and re-try the case. That is not its function. It must oversee the fairness of the trial and satisfy itself that there was evidence on which the jury could properly convict' (Blom-Cooper, 1997, p.8). Nobles and Schiff have argued that the process of review requires the Court of Appeal to identify how a conviction might have been constructed by the jury, rather than simply administering justice (or identifying miscarriages of justice) (Nobles and Schiff, 1997, 301).

If the Criminal Division's legally defined role as a court of review is to merely assess the fairness of the trial and whether there was evidence on which the jury could convict beyond all reasonable doubt, this makes it very difficult for injustice to be rectified as it precludes the Criminal Division from delving too deeply into factual issues and the merits of a case. This potentially explains why the Court is reluctant to assess factual issues and to hear fresh evidence on appeal as this would amount to a rehearing which is not its function. Therefore, it is not just the attitude of the judges to the jury, finality and resources that may have caused the problems associated with the Court as the way it was created in the first place lies at the heart of the issue. This can be illustrated further by looking at the process of review.

The process of review

The difficulties associated with the process of review can be broken down into three interlinked problems which are the preparation of appeals, the hearing of appeals and the burden and standard of proof on appeal. The decision making process of the Court was outlined by Sir Robin Auld in his review of the criminal courts (Auld, 2001). As Auld is a Court of Appeal judge, his review provided an insight into the working practices of the Court, which illustrates how problematic the decision making process can be.⁷⁹

The preparation of appeals

Prior to the appeal each judge is provided with a bundle of papers which are prepared by the Criminal Appeal Office. This bundle consists of counsel's advice on appeal, initial or draft grounds of appeal, 'perfected' grounds of appeal, a skeletal argument and a case summary prepared by the Criminal Appeal Office with a transcript of the evidence

⁷⁹ For an analysis of Sir Robin's proposals for the appellate process see Malleson and Roberts (2002).

or summing up which is referred to (Auld, 2001, ch. 12, para. 77). The case summary consists of a summary of the essential facts of the case, its procedural history, the matters of which complaint is made, the grounds of appeal and brief references to any relevant law (Auld, 2000, ch. 12, para. 82). They are prepared by caseworkers who are lawyers in the Criminal Appeal Office and there has been criticism of some of these case summaries as illustrated by Michael Beckman QC:

'As every practitioner is aware, these summaries can vary enormously in their quality, understanding and coverage. No doubt their intended purpose is to assist the court in the reading and comprehension of the papers concerned so that the maximum number of appeals can be dealt with efficiently in the minimum period of time' (Beckman, 1997, p. 948).

The Court is currently sitting six courts at a time with a constitution of three in an attempt to clear the current backlog and the judges have four reading days in every three week period (Criminal Division annual report, 2007-8, para. 1.3). As Auld has stated 'for each judge to prepare for each day involves much preparatory work, five or six hours preparation a day in addition to normal sitting hours, sometimes longer, and much of the weekend is not unusual' (Auld, 2001, ch. 12, para. 79). The judges of each constitution usually receive their hearing papers from the Criminal Appeal Office about a week before the appeals are listed for hearing and are expected to read and digest them thoroughly before sitting in the appeal. The judge allotted the task of giving the judgment in each case will often need to prepare in advance some provisional notes of the relevant facts, issues and law as a reference for his judgment (Auld, 2001, ch. 12, para. 82).

Auld himself has criticised this method of working. He stated:

'Working at such speed gives the judges of the court little time to focus on anything but the application of the law to the particular facts before them. They usually meet for the first time to discuss each day's list for about a quarter of an hour before going into court to hear and deal with it. It is thus difficult for them to apply and develop the law in a principled and consistent manner. Despite the Registrar's introduction of machinery to alert one constitution of the Court to similar points that have arisen or are about to arise in another constitution, inconsistencies arise or anomalies develop because of the piecemeal and focused way in which the judges have to work. The system is capable, because of these inconsistencies and anomalies, of engendering wrong decisions at first instance and otherwise unnecessary appeals. This is a serious shortcoming in the main judicial institution in this country responsible for declaring and developing the criminal law as well as for applying it' (Auld, 2001, ch. 12, para. 84.).

And:

'the Court as it is presently constituted and in the volume of its work, is plainly overloaded. Even though its judges can cope – just – I do not see why they or those appearing in front of them or their respective clients should have to put up with it' (para. 86).

As a consequence of this, Auld stated that the Court should be reorganised and reconstituted to enable it, first to concentrate on cases of general significance 'in which it can declare and develop the criminal law in a principled and more reflective way, so as to provide useful guidance to the courts below' and second, 'to apply well established principles or rules of law in a more consistent manner to correct errors and to ensure justice in individual cases' (Auld, 2001, ch. 12, para. 87). He recommended that in cases where there was a point of law of general public importance or of particular complexity or of public interest the Court should consist of the Lord Chief Justice, or the Vice President or a Lord Justice and two High Court judges. But in straightforward appeals against conviction the Court should consist of two High Court judges or one High Court and one Circuit judge. He also stated that the Court should 'slow down' and more preparation and judgement writing time should be allowed to the judges as part of their sitting plan' (para. 95). This appears to have been implemented as the Court have now been allocated four working days in every three week period which went up from three days recently (Criminal Division annual report, 2003, para. 2.2).

The hearing of the appeal may also cause potential problems for the appellant.

The hearing of appeals

Appeal hearings are generally very short and focused since the facts of the case and the main issues being raised have been set out in advance in the grounds of appeal and the case summary. Where the grounds of appeal are based on legal error, counsel will produce cases to support their arguments. The judges will often have read these in advance and they are usually dealt with relatively quickly (Malleeson, 1997, p. 177). The normal procedure for a contested appeal is for the defence to present the arguments in support of the appeal and for the Crown to respond. The Court is quite willing to receive evidence informally during the hearing and to take short cuts to save time. The Crown will not be asked to reply to points which the Court finds unarguable and where, from their reading of the case papers in advance. And where the judges consider a defence argument overwhelming argument by the defence may be dispensed with. During the hearing the judges frequently interrupt counsel, test their arguments, focus their attention on doubtful points, and in the process reveal the trend of their own thinking (Pattenden, 1996, p. 120).

Malleeson has argued (1997, p. 180) that the judges in the Court of Appeal see their role as being to direct counsel to the issues which they want to address. On appeal, counsel therefore has much less scope for presenting and developing arguments and so

affecting the outcome of the decision than when presenting a case to the jury. The judges come to the appeal hearing having read the papers and having formed a preliminary view, and they see the role of counsel as being primarily to assist them in the process of clarifying, testing and challenging the issues which they have already identified. The judgment of the Court is given at the end of the appeal hearing which illustrates how much preparation the judges have done beforehand. As Malleson has stated:

'in order to construct the judgment spontaneously at the close of the hearing the judges must be familiar with the issues and possible outcomes before the hearing begins. Although the exact decision or the detailed arguments put in court may not have been predictable beforehand, the judges are clearly in a position to have prepared, at least mentally, a significant proportion of the judgment before the hearing on the basis of the information provided in the papers, their readings and the discussions themselves.' (1997, p. 181)

The Court will occasionally reserve judgment in order to write it up before it is delivered but this usually happens in the more complicated appeals against conviction such as references from the CCRC.

Auld acknowledged that there were disadvantages to this process. He stated:

'The performance of the judges of the Court of Appeal, in their obvious familiarity with the facts and issues of law in the cases before them, and in the speed with which they dispatch them, often suggests to those in the court that they have made up their minds before hearing argument in the matter. I believe that, despite the rush, the judges are anxious to allow advocates to make their points and, if the points are good, are prepared to reconsider whatever provisional views they may have formed. But it does not always sound or feel like that to an unsuccessful advocate who has not been given an opportunity to develop his argument or to his client who may feel that his case has not received a full hearing' (Auld, 2001, ch. 12, para. 85).

This was certainly the experience of Michael Beckman QC who wrote an article on one particular experience he had at the Court of Appeal. He stated that the oral hearing of the appeal had taken place in the usual way with two of the judges taking a reasonably active part in the questioning and the third judge taking very little part. The hearing was reasonably courteous throughout but when the argument ended the judges did not depart to chambers but had a brief discussion amongst themselves in court and the third judge then gave the judgment. Beckman states:

'It was manifestly clear that the judgment had been prepared before argument. None of the specific points raised were addressed. There was a clear factual error which never could have been made had the argument been listened to and digested. Both appeal against conviction and sentence were dismissed in a host of generalities.' (Beckman, 1997, p. 948)

Auld has recommended that 'more time should be allowed to advocates to deploy their arguments and to the judges to consider the issues together in an unhurried way before and after argument' (Auld, 2001, para. 95) but as the workload of the Court is currently so heavy it is doubtful that this would be implemented.

Auld's review of the appellate process clearly shows that there are problems with the decision making process of the appeal. There are further potential problems for the appellant that relate to the burden and standard of proof.

The burden and standard of proof

One of the most confusing aspects of the appeal process can be determining where the burden of proof lies and how the standard of proof operates. This issue is not stipulated in legislation and the case law has remained largely silent on the matter. It would appear that the burden of proof is reversed on appeal. Maleson has argued that 'in most appeals the initial burden lies with the appellant who brings the case and so must prove it by persuading the judges that the conviction is unsafe' (1997, p. 184).⁸⁰ This is supported by case law; Stuart-Smith LJ in *R v Maguire and others*⁸¹ stated that there was a 'persuasive onus' on the appellant 'to argue his grounds in order to persuade us to think that a verdict is unsafe and unsatisfactory.' Similarly, Lord Hobhouse in *R v Pendleton*,⁸² in relation to the current test for quashing convictions, stated 'the appellant has to discharge a burden of persuasion and persuade the Court of Appeal that the conviction is unsafe.'

This reversal of the burden of proof appeared to be criticised by Lord Scarman during the passage of the Criminal Appeal Bill in 1995:

'The Court of Appeal – and this is perhaps not always understood – inevitably reverses the burden of proof. ...In an appeal against a conviction, the appellant goes first and put his case. The Crown, the prosecutor, responds. When new facts are considered by the Court and a ruling is made upon them by the court, the defendant appellant has to prove his case on the new facts. He now has to go first. The Crown answers. He no doubt has a reply, but he has to make the going. Where has the presumption of innocence gone? Where indeed, do we find the accused? He is attempting to establish a defence whereas if he was in the court of first instance, the evidence would be led by the Crown and he would have a presumption of innocence, with the burden of proof resting steadily on the Crown.'⁸³

Whilst this, and the case law, would appear to be authority that the burden of proof is indeed reversed on appeal, the operation of the standard of proof can also cause difficulties for appellants. If the normal criminal standard of proof applies then it would

⁸⁰ See also James, 1983, p. 156; Nobles and Schiff, 2000, p. 70; Pattenden, 1996, pp. 176-178.

⁸¹ [1992] 2 All ER 433, 442.

⁸² [2002] 1 WLR 72, 90.

⁸³ *H.L. Debs*, 8 June 1995, col. 1497-1498.

appear that the appellant has to prove either by new evidence or argument that there is a doubt as to the safety of the conviction. This presumably operates on the minds of the judges to quash the conviction if there is a reasonable doubt about the guilt of the appellant. However, what is not clear is how the judges decide this. For example, do the judges have to have a reasonable doubt or do they decide that the original jury would have had a reasonable doubt. This can create problems for fresh evidence appeals particularly when the judges have to view the fresh evidence in the light of the evidence given at trial. In lurking doubt appeals, it is presumably the judges themselves who have to have a reasonable doubt as the appellant is asking the judges to subjectively assess the evidence.

If the judges are deciding the appeal on the basis that there is a reasonable doubt about the guilt of the appellant, it is not clear how the judges are deciding the conviction is unsafe as a result of a procedural irregularity where they may be satisfied of the guilt of the appellant. This may be explained by Pattenden who has argued that where an appeal indirectly impugns the jury's finding of guilt, as in appeals where there has been a procedural irregularity, the defence must satisfy the Court that an error occurred which was of such dimensions that the ground for allowing the appeal is made out (the conviction is unsafe under the current test) (Pattenden 1996, p. 178). She states that this is not normally discussed in terms of the burden of proof which may explain why the standard of proof is not clear in those appeals.

The language used by the judges to describe the burden and standard of proof is also confusing. The persuasive burden is normally known as the legal burden and in the course of a trial if the legal burden of proof is on the defence then the standard of proof is on the balance of probabilities. If the judges are using the term 'persuasive' to mean legal burden then it is not clear from this whether the appellant has to prove the conviction is unsafe in terms of a reasonable doubt or on the balance of probabilities. But whatever the standard of proof used, the fact that the burden is on the defendant to persuade the judges that the conviction is unsafe can be a daunting task, especially considering that it appears some of the judges may have made up their minds before the appeal has even begun as discussed above.

The operation of the burden and standard of proof will be analysed in subsequent chapters relating to individual grounds of appeal.

Summary

The literature reviewed in this chapter shows that the Court's deference to the jury verdict and its reverence for the principle of finality has had a major impact on its role of overturning convictions. The evidence for this has come not only from empirical studies,

but also from the various committees that have been set up over the years to review the Court's powers. Whilst the impact jury deference and the principle of finality have had is fairly clear in the sense of the Court using them to uphold convictions, what is more debateable is whether the impact on the Court has been an overly restrictive one. The consensus from the academic literature and from the various committees is that the Court has adopted a restrictive approach and it has proven too reluctant to quash convictions. But as discussed, in the absence of a tried and tested method of measuring whether more convictions should be quashed, the evidence of a restrictive approach remains speculative even if it appears to be overwhelming by the sheer number of different sources that have made the same allegations. As Pattenden has argued, the difficulties in assessing the Court's approach are largely down to the inconsistencies of its decision making in defining its role and the balancing exercise it has to perform. The Court has to balance the competing values of justice on the one hand and the constraints of resources and the need for finality on the other on a day to day basis and assigning bench marks as to how this can be evaluated is very difficult. However, despite the problems of defining a bench mark by which to measure the Court's performance, and the difficulties associated with the 'exceptional' appeals, this thesis will adopt the view that the consensus is largely correct in citing the Court being too restrictive in its role of correcting miscarriages of justice.

With that in mind, this thesis argues that the problems associated with the Court are caused by three interlinked problems. Firstly, the statute that created the Court initially created a court of review which was unique and in contrast to both civil appeals and appeals from magistrates' courts. This has prevented the Court from delving too deeply into jury decision making since as its function is not to retry the case, the Court feels that decisions of fact are for the jury alone.

The second problem is the decision making process itself. The fact that the Court reads all the papers beforehand and generally only reads a transcript of the judge's summing up does not give it a full picture of what has gone on before. The result is because its review function is limited, it is not even an effective court of review. The judges are not given much time to read all the papers and get to grips with all the issues.

The third problem is the burden of proof on appeal. As the Court reads all the documents beforehand it is suggested that it comes to its prima facie decision before the appeal has even begun. As the burden of proof is on the appellant to persuade the Court that the conviction is unsafe, this makes it very difficult for the appellant and counsel to change the minds of the judges. The fact that the judgment is given shortly after the appeal ends, indicates that the Court rarely does change its mind.

The case law in the subsequent chapters will be analysed in order to determine what approach the Court takes to its powers and whether there is evidence of a restrictive approach to determining the appeal. In chapter four, the general findings from the 2002 sample of cases will be evaluated and compared to Malleson's sample from 1990. There will also be an analysis of the workload and success rate of the Court in order to provide a general picture of the Court's practices. A more detailed analysis of the Court's decision-making process will be provided in later chapters.

CHAPTER FOUR: GENERAL APPROACHES OF THE COURT OF APPEAL

As stated in previous chapters, there have only been four major studies conducted using the judgments of the Court of Appeal since its creation in 1907 (Ross 1911, Seaborne-Davies 1949, Knight 1970 and Malleson 1993). The last study was conducted over fifteen years ago by Kate Malleson for the RCCJ prior to the enactment of the Criminal Appeal Act 1995. Since then much has changed in the criminal appeal landscape. Empirical research is therefore required in order to determine what the current practice of the Court is. This study did not set out to prove whether the RCCJ's recommendations and subsequent Criminal Appeal Act have made a difference (as discussed in chapter two). Instead, it sought to provide an indication of similarities and differences in court practice when compared with Malleson's 1993 study and to provide some possible explanations for any differences. This chapter outlines the general findings of the research I have conducted and compares those findings with the general findings from Malleson's study. It also outlines the general approaches the Court of Appeal uses to determine appeals against conviction. The subsequent chapters will analyse the Court's powers individually.

As discussed in chapter two a research study was undertaken on the RCCJ's behalf by Kate Malleson which was designed to 'examine the practices of the Court of Appeal in order to determine how it interprets and applies its powers' (Malleson, 1993, p.1). In order to carry out this research, Malleson reviewed the first 300 appeals of 1990 and her methodology was to analyse each judgment separately and gather information on the grounds of appeal, the approach of the Court to the case, and the result of the appeal.⁸⁴ Where the Court commented on relevant issues such as fresh evidence or the 'lurking doubt' principle, these were recorded in order to obtain both qualitative and quantitative information on the Court's powers. As outlined in chapter two, I replicated the study using the same methodology and reviewed the first 300 available appeals of 2002.

As well as replicating the Malleson study, I added an additional element to the research which was not undertaken by Malleson in her study. I gathered information on the different approaches the Court uses to determine the appeal. The different approaches used were quantified in order to analyse the decision making processes of the Court and these will be outlined in this chapter.⁸⁵ This provides new data and new insights into the decision making of the Court. It also contributes to the originality of the PhD.

⁸⁴ See Appendix One for the data collection form.

⁸⁵ See Appendix Two for the form used to gather this information.

Before the general findings of both studies are compared it is necessary to analyse the figures in relation to the workload and success rate of appeals against conviction in order to provide a general picture of the Court's working practices.

The workload and success rate of the Court of Appeal

The figures relating to the workload and success rate of the Court of Appeal are collated annually by the Ministry of Justice (formerly the Department for Constitutional Affairs). The statistics for 1990, 2002 and 2006 are reviewed below. These years were selected for examination to coincide with the sample from Malleson's study, the sample from the replicated study, and the latest figures currently available, in order to compare and contrast the Court's workload and success rate. This may help to understand any impact the Criminal Appeal Act 1995 may have had on the Court of Appeal.

In 1990, there were 1,705 applications received by the Court of Appeal and of those 1,452 (85%)⁸⁶ had their applications for leave to appeal considered by the single judge. Of those 1,452 considered, 443 (31%) were granted leave to appeal with 1,009 (69%) rejected. Of the 1,009 rejected, 429 (43%) of appellants renewed their applications for leave to appeal. And of these (429), 101 (24%) were granted leave to appeal to the full court. Finally, of those 593 appeals against conviction heard by the full court, 256 (43%) were successful with 337 (57%) dismissed (Judicial Statistics, 1999).

These figures can be compared with those from 2002. In 2002, there were 1,914 applications received by the Court of Appeal which was a rise of 175 compared to 1990. Of those 1,914, 1,739 (91%) had their applications for leave considered by the single judge. Of those 1,739 considered, 405 (23%) were granted leave to appeal with 1,334 (77%) rejected. Of those 1,334 rejected, 457 (34%) renewed their applications for leave to appeal. Of those 457 who renewed their applications, 140 (31%) were granted leave to the full court. There were 485 appeals against conviction heard by the full court and 166 (34%) were successful with 319 (66%) dismissed (Judicial Statistics, 2005). These figures are in the table below.

⁸⁶ The 15% not considered by the single judge can be explained by a number of factors such as the application may have been abandoned, and the Registrar of the Criminal Division has the power to refer cases directly to the full court where the circumstances of the appeal require it or the trial judge issues a certificate that the case is fit for appeal under section 1(2)(b) Criminal Appeal Act 1968. The Registrar may refer cases directly to the Court, for example, when urgent guidance may be needed on a particular point of law. This occurred in the following cases regarding bad character provisions in the Criminal Justice Act 2003: *R v Hanson and others* [2005] EWCA Crim 824; *R v Bovell and Dowds* [2005] EWCA Crim 1091; *R v Edwards and others* [2005] EWCA Crim 1813; *R v Highton and others* [2005] EWCA Crim 1985 .

Table 4.1: Workload and success rate of the Court of Appeal in 1990 and 2002

| YEAR | N 1990 | % of applic'ns 1990 | N 2002 | % of applic'ns 2002 |
|--|------------------------|---------------------|------------------------|---------------------|
| Applications received | 1705 | 100% | 1914 | (100%) |
| Applications considered by a single judge | 1452 (85% of total) | 100% | 1739 (91% of total) | 100% |
| Leave granted | 443 | 31% | 405 | 23% |
| Leave rejected | 1009 | 69% | 1334 | 77% |
| Renewed applications to appeal | 429 (43% of total) | 100% | 457 (34% of total) | 100% |
| Leave granted after renewed application | 101 | 24% | 140 | 31% |
| Appeals* | 593 | 100% | 485 | 100% |
| Appeal successful | 256 | 43% | 166 | 34% |
| Appeal unsuccessful | 337 | 57% | 319 | 66% |

*Not all of these appeals are ones resulting from applications made in the year stated. Some will be applications made in a previous year but heard the next.

The conclusions that can be drawn from these figures are that although there were 209 more applications received in 2002 than in 1990, fewer applicants (in percentage terms) were granted leave to appeal in 2002. Fewer applicants renewed their applications for leave in 2002 but more applicants were granted leave to the full Court in 2002 after renewing the application to appeal than in 1990. These figures are contradictory but what is clear is that there were fewer successful appeals in 2002 than in 1990 with a drop of 9% (appeal outcomes are discussed in more detail below).

The latest figures available for 2006 show there were 1,596 applications which is a drop of 318 applications from 2002. Of those 1,596, 1,134 (71%) had their applications for leave considered by the single judge. Of those 1,134 considered, 291 (26%) were granted leave to appeal with 843 (74%) rejected. Of those 843 rejected, 481 (57%) renewed their applications for leave to appeal. Of those 481 who renewed their applications, 137 (28%) were granted leave to the full court. There were 572 appeals against conviction heard by the full court and 181 (32%) were successful with 391 (68%) dismissed (Judicial Statistics, 2006). This is outlined in the table below:

Table 4.2: Workload and success rate of the Court of Appeal in 1990, 2002 and 2006

| YEAR | N 1990 & % total | % of applic'ns 1990 | N 2002 & % of total | % of applic'ns 2002 | N 2006 & % total | % of applic'ns 2006 |
|--|------------------------|---------------------------|---------------------------|---------------------------|------------------------|---------------------------|
| Applications received | 1705 | 100% | 1914 | 100% | 1596 | 100% |
| Applications considered | 1452 (85%) | 100% | 1739 (91%) | 100% | 1134 (71%) | 100% |
| Leave granted | 443 | 31% | 405 | 23% | 291 | 26% |
| Leave rejected | 1009 | 69% | 1334 | 77% | 843 | 74% |
| Renewed applications to appeal | 429 (43%) | 100% | 457 (34%) | 100% | 481 (57%) | 100% |
| Leave granted (renewed application) | 101 | 24% | 140 | 31% | 137 | 28% |
| Appeals* | 593 | 100% | 485 | 100% | 572 | 100% |
| Appeal successful | 256 | 43% | 166 | 34% | 181 | 32% |
| Appeal unsuccessful | 337 | 57% | 319 | 66% | 391 | 68% |

*Not all of these appeals are ones resulting from applications made in the year stated. Some will be applications made in a previous year but heard the next.

These figures show there was a 20% drop between 2002 and 2006 in applications to the Court being considered by the single judge. An interpretation of this figure is that more appeals are being abandoned and/or there are more appeals where leave is not required. These could either be referrals by the Registrar to the full court or referrals from the Criminal Cases Review Commission which do not require leave. The figures for leave granted are similar between 2002 and 2006 with 23% and 26% respectively but there appears to be a big increase in those renewing their applications for leave with 34% in 2002 and 57% in 2006.

The big increase in the numbers renewing their applications for leave is having a real impact on the workload of the Court. This has had a number of consequences. The Court of Appeal (Criminal Division) annual report for April 2001 to March 2002⁸⁷ indicated that the average waiting time during that period was 12.2 months for appeals against conviction. The annual report for 2002 to 2003 showed that things had got worse. The average waiting time over the year was 14.5 months and in relation to the increase in the number of renewed applications for leave to appeal, Lord Woolf stated 'this additional work represents considerable additional pressure upon already stretched judicial and administrative resources' (para. 2.14). The annual report for 2003 to 2004 showed that the waiting times peaked at 15.2 months in September 2003 but had

⁸⁷ Available from the Court Service website.
See <http://www.hmcourts-service.gov.uk/cms/1497.htm>.

reduced slightly to 14.7 months by September 2004. The 2004 to 2005⁸⁸ report showed there had been a slight decrease in waiting times for appeals against conviction from 14.7 months to 14.1 months (para. 1.8) and the report for 2005 to 2006⁸⁹ indicated the waiting time had further been reduced to 12 months (para 1.7). The downward trend continued in 2006 to 2007⁹⁰ with a further reduction down to 10.9 months (para 1.3) but the latest annual report for 2007-8⁹¹ shows there has been an increase of waiting times to 11.1 months. This suggests that the workload of the Court has got heavier over the last year.

The number renewing their applications to appeal is only one factor which affects the Court's workload. There are a number of other factors such as the complexity of cases, the efficiency of the parties involved and the extent of judicial and administrative resources to cope with the demand. In the annual report 2005-6, Lord Phillips stated that there was evidence that cases were becoming more complex and that references from the Criminal Cases Review Commission tended to be the most complex (Annual Report, 2005-6, para. 1.3-1.4). Therefore, the number of references from the CCRC has a major impact on the workload of the Court. The workload of the judiciary also has an impact. Lord Justices of Appeal have a number of administrative duties, such as sitting on the Judicial Appointments Committee, which impacts on their availability to hear appeals. They may also be needed in other courts. The Court of Appeal usually sits in six constitutions which had to be reduced to five during 2008 because a constitution had to be released to sit in the Administrative Court which was overburdened during that time (Annual Report, 2007-8, para. 1.13). Again, this illustrates the competing demands facing Court of Appeal judges, and also goes to the matter of judicial and administrative resources available to address potential wrongful convictions.

There has also been an increase in recent years in the duties of the Court. For example, the Court has to deal with a number of interlocutory appeals under section 9 of the Criminal Justice Act 1987, section 35 of the Criminal Procedure and Investigations Act 1996 and Part 9 of the Criminal Justice Act 2003. These appeals can be very disruptive to the Court's schedule as they may have to be listed at short notice. The Court also has to deal with applications under the Proceeds of Crime Act, Part 10 of the Criminal Justice Act, references by the Attorney General in relation to acquittals and sentences (section 36 of the Criminal Justice Act 1988), and appeals under the sentencing provisions under the Criminal Justice Act 2003. This list is not exhaustive but provides

⁸⁸ *The Court of Appeal Criminal Division Annual Review* October 2004 to September 2005. Available from http://www.hmcourtsservice.gov.uk/cms/files/crim_div_review_2004_05.pdf.

⁸⁹ *The Court of Appeal Criminal Division Annual Review* October 2005 to September 2006. Available from http://www.judiciary.gov.uk/docs/judgments_guidance/coareview2005-6.pdf.

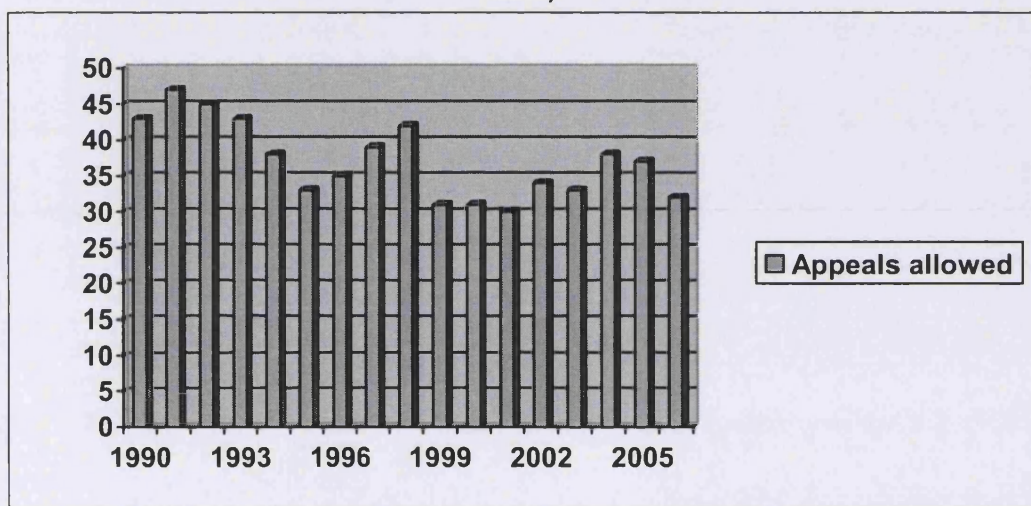
⁹⁰ *The Court of Appeal Criminal Division Annual Review* October 2006 to September 2007. Available from <http://www.judiciary.gov.uk/docs/coareview2006-7.pdf>.

⁹¹ *The Court of Appeal Criminal Division Annual Review* October 2007 to September 2008. Available from https://www.hmcourtsservice.gov.uk/cms/files/Criminal_Division_Review_2007-08_web.pdf.

an indication of the workload of the Court in addition to deciding appeals against conviction. It also decides on appeals against sentence which often have to be prioritised so the appellant does not serve his/her sentence before the appeal is heard.

A further indication of the performance of the Court is the success rates for appeals. As table 4.2 shows, the success rate for appeals in 1990 was 43% (based on the total of appeals finally decided by the Court). This can be compared to 2002 when the success rate had dropped to 34%. The success rate in 2006 was very similar to 2002 and had dropped to 32%. The graph below shows the success rate of appeals from 1990 to 2006.⁹²

Graph 4.1: Appeals allowed 1990 to 2006 (percentages of appeals decided by the Court)



This possibly confirms the views of those during the debates on the CAA 1995 that the Court of Appeal was going through a liberal phase in the early 1990s⁹³ as evidenced by the higher percentage of convictions quashed. They argued that the Court was more inclined to quash convictions during this period. It also possibly shows that the Criminal Appeal Act 1995 had an immediate impact on the number of convictions quashed as 1996, 1997 and 1998 all show an increase in convictions quashed after a dip in 1995. But the Court has arguably adopted a more restrictive approach since then resulting in fewer appeals being quashed.

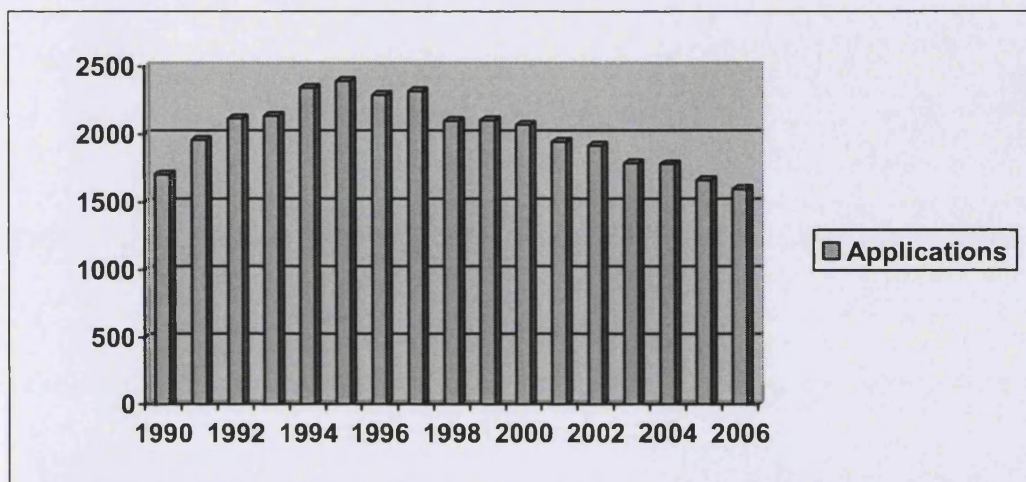
The potentially restrictive approach could also be illustrated by an examination of the number of applications to the Court. It could be argued that the so-called liberal phase encouraged more applicants to appeal, a restrictive phase would likewise do the

⁹² Figures taken from *Judicial Statistics 2000* and *Judicial and Court Statistics 2006*.

⁹³ See chapter one.

reverse. The graph below shows the number of applications to the Court over the period 1990 to 2006.

Graph 4.2: Applications for leave to appeal 1990 to 2006



This graph shows that there was a steady increase in applications to the Court from 1990 when there were 1,705, to a high of 2,393 in 1995. Since 1995 there has been a steady decrease in the number of applications to appeal to the current figure of 1,596 applications in 2006. The volume of defendants appealing to the Court is guided by a number of factors. For example, in the 1960s there had been an almost five-fold increase in the workload of the Court since it was created which was 'as a result of the volume of crime and prosecutions.'⁹⁴ And in the late 1960s a recommendation by the Widgery Committee (1966) on Legal Aid, that each prison should provide information to prisoners on appeal, resulted in 12,000 applications being received in 1970. This was a sharp rise when compared with the average figure of 2,500 in the 1960s. But the Court's attitude itself is undoubtedly a factor as the rise in 1970 could also have been a response to the Court's new powers in the 1968 Act and a supposedly more liberal approach as illustrated by the Court's decision in *Cooper*. The steady rise in applications to the Court from 1,705 applications received in 1990 to a peak of 2,393 in 1995 could arguably have been a response to the high profile convictions of the Guildford Four and the Birmingham Six being quashed.⁹⁵ Since then, under the stewardship of Lord Bingham CJ and Lord Woolf CJ respectively there has been a steady decline in applications with 1,596 received in 2006.⁹⁶

⁹⁴ Attorney General, *H.L. Debs*, 11 July 1966, col. 1108.

⁹⁵ *Judicial and Court Statistics 2006*, table 1.6. In an interview in *The Guardian*, Lord Taylor stated that the publicity accompanying the successful appeals produced a 26% increase in the number of appeals received in the first five months of 1992, compared with the same period in 1991 (20 July 1992).

⁹⁶ *Judicial and Court Statistics 2006*, table 1.6.

One possible conclusion from these figures is that rather than encapsulating the Court's apparent liberal approach in the early 1990s, the changes in the Criminal Appeal Act 1995 have resulted in it taking a more restrictive approach. This would explain the steady decline in both applications and appeals allowed since the early 1990s. It could be argued that there may be a correlation between these figures in that fewer applications may lead to a lower success rate, but in 1990, there were 1,705 applications with a success rate of 43% against 1,914 applications with a 34% success rate in 2002. This shows that the success rate of appeals is not necessarily affected by the number of applications to the Court. However, there may be a relationship between the number of applications to the Court and the success rate of appeals as a lower success rate may deter defendants from appealing.

There is no obvious reason as to why the CAA 1995 would have resulted in fewer applications and a lower success rate. The changes in the law did not make it more procedurally or legally difficult to appeal. But there may have been a change in judicial attitudes. This can be examined further by evaluating the general findings from the research conducted on the judgments of the Court. The research conducted by Kate Malleson for the RCCJ will now be analysed and compared to the replicated study from 2002.

The 1990 and 2002 sample findings

In Malleson's study of the first 300 appeals of 1990, 216 (72%) were full appeals and eighty-four (28%) were renewed applications for leave to appeal, forty-seven (16%) of which were own grounds.⁹⁷ Just over one third of the appeal grounds reviewed were allowed (102 (34%)). This is set out in the table below:

⁹⁷ These are appeals where the applicant/appellant has drafted their own grounds of appeal.

Table 4.3: Grounds of appeal of cases before the Court of Appeal (Criminal Division) January to July 1990

Total no. of cases: 300 Total no. of grounds: 329⁹⁸

| Grounds | Allowed | Dismissed/ Refused | Adj'd ⁹⁹ | % of total |
|--|--------------------------|-----------------------|---------------------|---------------|
| Misdirection on the law or evidence | 42 | 67 | 4 | 35% |
| Poor/unbalanced summing up | 16 | 22 | 4 | 13% |
| Evidence wrongly included/excluded | 8 | 26 | 3 | 11% |
| Inconsistent verdicts | 8 | 9 | 0 | 5% |
| No case to answer | 7 | 16 | 0 | 7% |
| Weak ID evidence | 2 | 4 | 1 | 2% |
| Jury irregularity | 2 | 9 | 0 | 3% |
| Fresh evidence | 5 | 15 | 3 | 7% |
| Generally unsafe and unsatisfactory | 2 | 4 | 1 | 2% |
| No Jurisdiction | 2 | 0 | 0 | 1% |
| Co-D should have been tried separately | 1 | 1 | 0 | 1% |
| Equivocal plea | 0 | 4 | 0 | 1% |
| Counsel's errors | 0 | 9 | 0 | 3% |
| Prejudiced trial | 0 | 2 | 1 | 1% |
| Other | 4 | 10 | 0 | 4% |
| Not specified | 2 | 10 | 2 | 4% |
| TOTAL | 102¹⁰⁰ | 208 | 19 | 100% |

In the replicated study of the first 300 available appeals of 2002, 179 (60%) were full appeals and 121 (40%) were renewed applications for leave to appeal, fifty-one (17%) of which were own grounds. There were seventy-six appeal grounds allowed (25%). See table below:

⁹⁸ There are more grounds than appeals because some appeals raised more than one ground.

⁹⁹ These cases are adjourned for a full hearing being renewed applications for leave to appeal.

¹⁰⁰ There is an error in the table. The total says 102 but the figures add up to 101.

Table 4.4: Grounds of appeal of available¹⁰¹ cases before the Court of Appeal (Criminal Division) January to May 2002

Total no. of cases: 300 Total no. of grounds: 641

| Grounds | Allowed | Dismissed/ Refused | Adj'd | % of total |
|--|-----------|-----------------------|-----------|---------------|
| Misdirection on the law or evidence | 28 | 113 | 5 | 23% |
| Defective/unbalanced summing up | 10 | 78 | 4 | 14% |
| Evidence wrongly included/excluded | 5 | 65 | 5 | 12% |
| Fresh evidence | 9 | 26 | 1 | 6% |
| No case to answer | 0 | 34 | 0 | 5% |
| Non-disclosure of evidence | 0 | 23 | 1 | 4% |
| Trial should have been withdrawn or adjourned or stayed as an abuse of process | 0 | 23 | 0 | 4% |
| Unfair trial/breach of Article 6 | 0 | 22 | 0 | 3% |
| Inconsistent/perverse verdicts | 2 | 12 | 1 | 2% |
| Judge unfairly intervened | 5 | 7 | 2 | 2% |
| Prosecution errors | 1 | 9 | 0 | 2% |
| Police malpractice | 3 | 8 | 0 | 2% |
| Lawyer error | 0 | 10 | 0 | 2% |
| Jury should have been discharged | 0 | 9 | 0 | 1% |
| Weak/insufficient evidence | 2 | 6 | 0 | 1% |
| Generally unsafe (including lurking doubt) ¹ | | 6 | 0 | 1% |
| Counts should have been severed/ Withdrawn | 1 | 7 | 0 | 1% |
| Biased tribunal | 0 | 7 | 0 | 1% |
| Previous convictions incorrectly admitted | 1 | 3 | 1 | 1% |
| Jury irregularity | 0 | 5 | 0 | 1% |
| Breaches of Human Rights Act ¹⁰² | 0 | 5 | 0 | 1% |
| Judge did not adequately answer jury question | 0 | 4 | 0 | 1% |
| Pressure to plead guilty | 0 | 3 | 0 | 0% |
| Indictment should not have been amended | 0 | 3 | 0 | 0% |
| Other ¹⁰³ | 8 | 54 | 3 | 10% |
| TOTAL | 76 | 542 | 23 | 100% |

There are a number of obvious differences between the two samples. The first difference is that the number of full appeals is larger in the 1990 sample than the 2002 sample. These are appeals where leave has been granted by the single judge and the full court of three judges has adjudicated on the appeal. In 1990, there were 216 with 179 in 2002. These figures tally with the general picture discussed above for the years 1990 and 2002. In 1990, 443 (from 1,705 applications) appeals were granted leave to appeal with 405 (from 1,914 applications) in 2002. This therefore, shows that more

¹⁰¹ Cases obtained from Casetrack as discussed in chapter two. Some of the cases were not available as they were subject to reporting restrictions.

¹⁰² These are breaches other than Article 6.

¹⁰³ This category was largely own grounds appeals where the applicant/appellant had drafted his own grounds which did not fit into any of the other areas. They tended to be issues of fact that were within the remit of the jury and the Court largely dismissed them.

appeals were granted leave in 1990 (despite fewer applications), in keeping with the higher figure of full appeals in Malleson's sample and the lower figure in this study.

The second difference in the two samples is that there is a lower figure of renewed applications in the 1990 sample than in 2002. In 1990, there were eighty-four renewed applications with 121 in 2002. Again, these figures seem to tally with the general picture for 1990 and 2002. In 1990, 429 renewed their applications for leave to appeal with 457 in 2002. This therefore shows that more defendants renewed their applications to appeal in 2002 which explains the higher figure of renewed applications in the 2002 sample.

The third difference is the number of grounds of appeal argued, as indicated in tables 4.3 and 4.4. Although both samples had 300 judgments, there is a big difference in the number of grounds of appeal between the samples. Malleson had 329 grounds from 300 judgments and the 2002 sample had 641 from the same number of judgments. It could be argued that applicants/appellants as of 2002 were arguing more grounds per appeal under the new safety test than they necessarily would have done under the old test.

In addition, as can be seen from the 2002 sample, a larger number of different types of grounds are argued than in the 1990 sample. This may indicate that the new test encompasses a wider variety of grounds than were argued under the old test. It would appear that the RCCJ's aim in recommending the new test '[to] give the Court the flexibility to consider all categories of appeal' has been achieved and that, as table 4.4 demonstrates, the Court is considering a wider variety of grounds than previously in table 4.3.

However, the rise in the number of grounds may also be explained by the large number of changes in the law between 1990 and 2002. For example, the enactment of the Human Rights Act 1998 makes it much more likely that there would be an increase in human rights arguments. This explains why these appeals appear in the 2002 sample but not as a separate category in the 1990 sample. There are other pieces of legislation which may also have had an impact include the right to silence provisions in the Criminal Justice and Public Order Act 1994 and the disclosure provisions in the Criminal Procedure and Investigations Act 1996. There has also been a huge rise in the number of criminal offences created under the Labour Government with more than 3,600 alleged to have been created overall (this figure is disputed because some of these crimes will be amendments to existing crimes).¹⁰⁴ These new offences would not all have been tried

¹⁰⁴ See Morris, N 'More Than 3,600 New Offences Under Labour, *The Independent*, 4 September 2008. Available from <http://www.independent.co.uk/news/uk/home-news/more-than-3600-new-offences-under-labour-918053.html>. For a discussion on the Labour Government's policies on the criminal justice system see Solomon, E *et al* (2007).

in the Crown Court, and therefore not all would be eligible to appeal to the Court of Appeal, but they may have had an impact on the number of grounds to appeal.

The increase in the number of grounds may also be explained by the creation of the Criminal Cases Review Commission, which has the power to refer cases back to the Court of Appeal. The CCRC was created by the Criminal Appeal Act 1995 and began work on the 1 April 1997. The referrals, therefore, will be a factor in the 2002 sample but not in the 1990 sample. These are cases that have usually been through the appeal process and failed but the CCRC does have the power to refer cases under 'exceptional circumstances' when this has not occurred. When cases are referred to the Court by the CCRC, they are treated as normal appeals.¹⁰⁵ But the difference is that these appeals do not have to go through the leave process so cannot be filtered out at that stage. Until 2003, the appellant also had the opportunity of adding grounds to the appeal which had not been the subject of the referral. So if the CCRC decided to refer the appeal on certain grounds, the appellant could then add more grounds to be considered by the Court. This may have had an impact on the increase in grounds in the 2002 sample. The law was changed by section 315 of the Criminal Justice Act 2003 and so now if the appellant wants to add additional grounds to those upon which the CCRC has referred the case, leave has to be granted for those additional grounds. Therefore, the CCRC may have had a major impact on the 2002 sample which could partly explain the difference in the number of grounds.

Whatever the reasons for the increase in the number of grounds, the 1990 sample shows that the percentage of grounds allowed was higher in the 1990 sample (31%) than the 2002 sample (12%). This is potentially explained by fewer grounds being argued in the 1990 sample as only one ground need be successful for an appeal to be allowed. Therefore, although more grounds may result in a higher chance of a successful appeal, there is also the opportunity for more grounds to be unsuccessful. But a higher percentage being allowed in the 1990 sample does tally with the number of successful appeals as discussed above, with fewer appeals being allowed generally in 2002 even though more grounds were argued.

Whilst there may be differences as outlined above, the most common grounds argued in both samples were the same, being errors of the trial judge. In Malleson's sample these constituted 59% of the total grounds and 49% in the 2002 sample. When comparing the three most common grounds in the samples – misdirection on the law or evidence, defective or unbalanced summing up and evidence wrongly excluded or included, they all demonstrate that more appeals were allowed in the 1990 sample than the 2002 sample. In the 1990 sample, seventy-seven (40%) of these grounds were allowed with

¹⁰⁵ Criminal Appeal Act 1995, section 9.

115 (60%) dismissed or refused. In the 2002 sample, fifty-seven (18%) of these grounds were allowed with 256 (82%) dismissed. This shows that fewer appeals with these grounds were allowed in 2002 and appears to confirm the statistics discussed above (indicating that there has been a downward trend in allowed appeals since 1990). These figures are not representative of each appeal as one appeal may have raised a number of grounds on which the appeal was successful. Rather, they represent the success and failure rate of the specific ground as the grounds were collated separately from each appeal.

Both samples show that the majority of grounds are procedural irregularities with very few based on factual error. In the 1990 sample, fresh evidence grounds were 7% of the total grounds with 6% in the 2002 sample, and 'lurking doubt' type grounds were 2% in 1990 and 1% in 2002. Therefore, the 2002 sample appears to confirm Malleson's findings that most of the Court's time is spent reviewing the decisions of the trial judge and that it is rare for the Court to hear fresh evidence or consider the existence of a 'lurking doubt' (Malleson, 1993, p. 15). This will be discussed in much more detail in chapters five and six.

The samples also show a difference in the workload of the Court. Malleson's sample of 300 appeals covered the period January to July. The sample from 2002 covered the period January to May. This is indicative of the increasing workload of the Court because it shows the Court dealing with the same number of cases but in a much shorter time in 2002. The Court dealt with a much larger number of cases per year in 2002 than in 1990. This corresponds with the figures above which show a larger number of applications in 2002 than there were in 1990.

As well as replicating Malleson's study, I also added an additional element to the research which Malleson did not undertake. I collected data from the judgments on the general approaches the Court of Appeal uses to determine the appeal. The decision making process of the Court was collated and quantified in relation to the different grounds of appeal. This was done in order to ascertain what the decision making process of the Court is in order to determine why its decision making is can be problematic. The decision making processes were identified from the judgments¹⁰⁶ and will be analysed in detail in chapters five, six and seven. For the purposes of this chapter it is necessary to outline the categories of approaches that the Court uses in order to provide a general picture of the Court's approach.

¹⁰⁶ See Appendix 2 for the form used to compile the approaches.

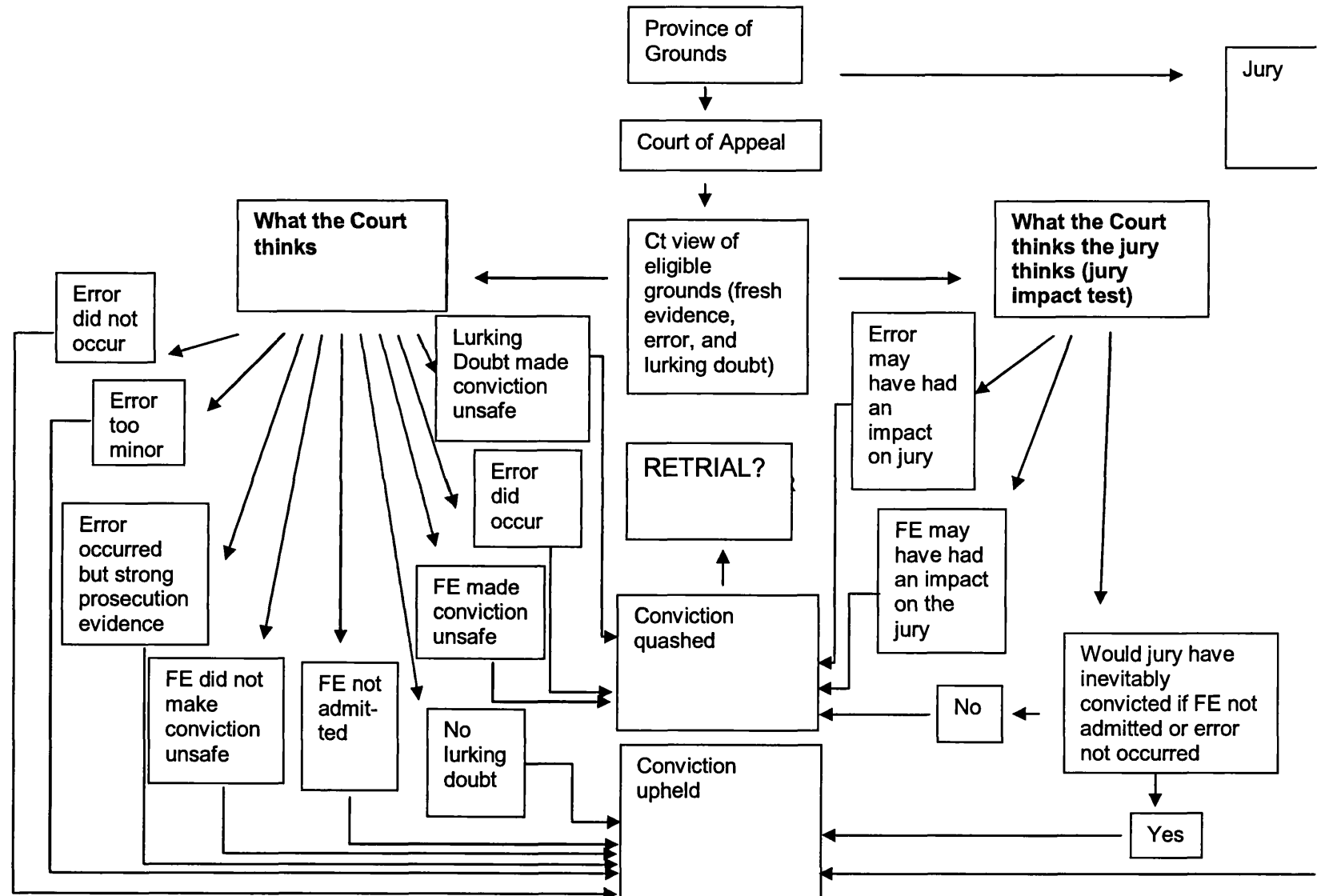
The general approaches of the Court of Appeal to determining appeals against conviction

As the Court has been given fairly wide statutory powers under the various Criminal Appeal Acts, it has adopted its own processes to determine the appeal. Although the Court and the House of Lords have set out general tests to be followed, both have refrained from outlining a specific approach to be adopted when applying the tests, preferring to leave it to the Court to decide that for itself.¹⁰⁷ Whilst this does allow for flexibility, the downside is that a number of contradictory approaches have developed which have created inconsistency and unpredictability. These approaches may also have contributed to the criticisms that the Court has taken a restrictive approach to identifying and correcting miscarriages of justice.

Since the Court of Criminal Appeal was created in 1907, the common law tests that have been adopted for the Court to follow in relation to its statutory powers can broadly be divided into two. The first test is what the Court itself thinks of the merits of the ground of appeal. The second test is the 'jury impact test' whereby the Court assesses what the original jury, or a reasonable jury, may have concluded in relation to the ground of appeal. The diagram below outlines the various approaches the judges in the Court of Appeal use to determine appeals against conviction. The term 'FE' stands for fresh evidence.

¹⁰⁷ For example, Lord Bingham in *R v Pendleton* stated that 'it is undesirablethat adherence to a particular thought process should be required by judicial decision.' See above, n. 82, p. 83.

Diagram 4.1: The Decision Making Process



As the diagram shows, there is an initial assessment by the Court as to whether the province of grounds is for the Court of Appeal to determine. If the Court believes that the grounds raised were merely factual issues for the jury to assess, then the conviction will be upheld. If it is felt that the grounds raised are the province of the Court then the Court will make an assessment of the grounds in order to determine the appeal. The grounds of appeal broadly fall into three categories, firstly, whether there was fresh evidence, secondly, whether there was a procedural irregularity and thirdly, the lurking doubt ground of appeal.

As stated above, the decision making process of the Court can be divided into two categories. The first is what the Court thinks of the ground of appeal and the second is what the Court thinks either the original jury or a reasonable jury may have made of the ground of appeal (known as the jury impact test). Either of these approaches may result in the conviction being upheld or quashed.

With regard to the 'lurking doubt' ground of appeal, the diagram shows that the Court only uses one decision making process which is what the Court thinks of the ground. The Court either decides that there is no lurking doubt which results in the conviction being upheld or the Court decides there is a lurking doubt which has made the conviction unsafe and therefore, it should be quashed. This complies with the subjective test set out in *Cooper* to determine these appeals. The diagram shows that in relation to fresh evidence or procedural irregularity (error) grounds the Court uses either process to determine the appeal. With regard to fresh evidence appeals the diagram shows a number of differing approaches that the Court may use. If the Court decides not to admit the fresh evidence then the appeal is upheld. If the Court decides to admit the fresh evidence it then has a number of options to determine the appeal. The Court itself may decide that the fresh evidence did not make the conviction unsafe and uphold the appeal or it may decide that the fresh evidence did make the conviction unsafe and quash the conviction. Alternatively, the Court may apply the jury impact test and decide that the fresh evidence may have had an impact on the jury and quash the conviction or it may decide that the jury would not have inevitably convicted if the fresh evidence was not admitted and quash the conviction. If the Court decides that the jury would have inevitably convicted if the fresh evidence was not admitted then the conviction will be upheld.

With regard to procedural irregularities, the Court has a number of options. Both tables (4.3 and 4.4 above) indicate that the majority of the Court's work is determining appeals where there has been some kind of procedural irregularity. There are numerous potential procedural irregularities such as, the judge may misdirect the jury on the evidence or law, there may be non-disclosure of evidence or there may be lawyer or

prosecution errors. The procedural irregularities in the tables are basically, all the grounds of appeal that are not fresh evidence or lurking doubt grounds. These are referred to as 'errors' in the diagram. The Court may decide that the error did not occur, or if it did occur, that there was strong prosecution evidence or the error was too minor. These will result in the conviction being upheld. The Court may decide that the error did occur and quash the conviction. Alternatively, the Court may apply the jury impact test and if it decides that the error may have had an impact on the jury, it will quash the conviction. If it decides that the jury would have inevitably convicted if the error did not occur, then the conviction will be upheld, but if it decides that the jury would not have inevitably convicted if the error had not occurred, it will quash the conviction. If the Court decides to quash the conviction it will then decide whether to order a retrial but it cannot decide to order a retrial until it has made the decision to quash the conviction.

As the above shows, the Court has developed a number of different approaches to determine the appeal. This does allow the judges to be flexible, however, it also goes some way to explaining why the decision making process of the Court is so inconsistent, contradictory and unpredictable. This will be explored in the following chapters.

Summary

The statistical evidence is contradictory as to whether there were any major changes between the 1990 and 2002 samples. What is clear from the figures is that in the mid to late 1990s there was an increase in the number of applications to appeal and there was a rise in the number of convictions being quashed. This is potentially evidence that the Criminal Appeal Act 1995 did have an impact on both of these areas after its enactment. Both of these figures dropped in the late 1990s with a decrease in applications and the number of successful appeals which has continued up to 2006. This is possible evidence that the 1995 Act resulted in a more restrictive approach being taken rather than encapsulating a liberal approach prior to it. Admittedly, other factors may also have played a role.

The big difference between the two samples is the number of differing grounds being argued. Although the grounds of appeal are generally categorised into three areas – fresh evidence, procedural irregularities and lurking doubt – there are a wide variety of grounds within those broad categories. The much wider number in the 2002 sample is possible evidence that the 'safety' test in the 1995 Act encompasses a much wider variety than its predecessor in the 1968 Act. But the most noticeable figures in the two samples are the similarities between the most common grounds and the small number of appeals based on factual error. This is arguably evidence that the 1995 Act has not made an impact on either of these areas. This will be explored in more detail in chapters five and six.

The large number of differing approaches the Court uses to determine the appeal explains to some extent, the Court's inconsistent decision making. These approaches are based on the common law tests the Court has been given, to be outlined in the subsequent chapters. There are conflicting arguments as to whether the Court's choice of test (the test of what it thinks or the jury impact test) makes a difference. In the following chapters, the differing approaches will be analysed in detail in relation to the grounds of appeal to ascertain whether these differing approaches do make any difference to the Court's approach.

In chapter five, the fresh evidence grounds from the two samples will be analysed in detail. The common law tests used to determine the appeal will be outlined. The Court's decision making process will also be assessed to examine if there are any differences between the Court's differing approaches to determining these appeals.

CHAPTER FIVE: APPEALS BASED ON THE CORRECTNESS OF THE JURY VERDICT: FRESH EVIDENCE

As stated in previous chapters, the main criticism of the Court of Appeal has been that it is deficient at rectifying the wrongful convictions of the factually innocent. This stems from the Court's perceived difficulties in relation to appeals based on factual error. These appeals are generally made up of two grounds of appeal which are fresh evidence and 'lurking doubt.' For these appeals, the argument essentially is that the jury made a mistake and the appellant was wrongly convicted in the sense that he/she did not commit the crime. As discussed in chapter three, these appeals have tended to cause the most difficulty because of the Court's perceived reluctance to admit that the jury made an error and convicted the wrong person. These appeals also cause the most difficulty because the decision making process of the Court is not necessarily conducive to determining these appeals. This chapter will analyse the fresh evidence grounds from the 1990 and 2002 samples and will also outline the common law tests that the Court has developed to determine these appeals. There will then be an analysis of the decision making process from the judgments in order to ascertain how the Court determines the appeal. This will be necessary in order to assess whether a restrictive approach is taken to these appeals and if so, where the problem lies. There will also be an analysis of the law after 2002 to see whether there have been any more recent developments.

The historical approach to fresh evidence appeals will now be discussed in order to put the 2002 cases in context.

The historical approach to fresh evidence appeals

As discussed in chapter three, the Court was originally given wide powers under section 9 of the CAA 1907 to adduce evidence on appeal but it chose to interpret those powers narrowly and imposed hurdles such as: that evidence had to be credible and relevant to the issue of guilt,¹⁰⁸ that the evidence had to be admissible,¹⁰⁹ and that the evidence could not have been put before the jury.¹¹⁰ These principles were summarised by Lord Parker, LCJ in *R v Parks* in 1962.¹¹¹

'First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence that is credible evidence in

¹⁰⁸ *R v Dunton* [1908] 1 Cr. App. R. 165.

¹⁰⁹ *R v Tellett* [1921] 15 Cr. App. R. 159.

¹¹⁰ *R v Jones* [1908] 2 Cr. App. R. 27.

¹¹¹ [1962] 46 Cr. App. R. 29.

the sense that it is well capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.'

This case showed that the Court was initially applying an objective test in deciding fresh evidence appeals by analysing the influence that fresh evidence may have had on the original jury, or a reasonable jury. Lord Parker also alluded to why the Court would take a restrictive approach to fresh evidence appeals. He stated:

'it is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would be in effect asked to effect a new trial.'

As the Court is a review Court it does not have the power to rehear the case. Therefore, it cannot perform a retrial with the new evidence. This issue was discussed by the Donovan Committee which was set up in 1965 to review the working practices of the Court. It agreed with the various pronouncements in the judgments of the Court that the Court of Criminal Appeal was not a court of re-trial and an appeal to it 'is not an appeal by way of a re-hearing of the case.' The Committee acknowledged that if fresh evidence was admitted as a matter of course there would clearly be a risk that the Court would on occasions find itself re-trying a case - 'a function which Parliament did not intend it to discharge, and for which it is in any event inadequately equipped' (para. 132). However, the Committee did hear evidence that the conditions the Court had imposed on the reception of fresh evidence were too narrow and the condition that had caused the most disquiet was the one which stated that additional evidence should not have been available at the original trial. The Committee recommended that additional evidence should be received, if it was relevant and credible and there was a reasonable explanation for the failure to place it before the jury (para. 136). These proposals were incorporated into the 1966 Criminal Appeal Act.

The Court of Appeal was given the power to order a retrial in fresh evidence appeals in section 1(1) of the Criminal Appeal Act 1964. It was hoped that this, and the amendments to the Court's powers, would succeed in liberalising the Court's approach to these appeals. The provisions of the 1964 Act and the 1966 Act were consolidated in the Criminal Appeal Act 1968 and section 5 became section 23 of the 1968 Act. Section 23(1) consisted of a general discretion for the Court to admit evidence 'if they think it necessary or expedient in the interests of justice.' In addition section 23(2) set out a duty to admit evidence if certain criteria of credibility, relevance, and an adequate explanation for not adducing it at the original trial were fulfilled. It would seem that initially there was

a more liberal approach to fresh evidence appeals. In *R v Harris*,¹¹² for example, the fresh evidence was admitted as 'the justice of the case required that it should be heard.'

However, Edmund Davies LJ in *R v Stafford and R v Luvaglio*¹¹³ took a more cautious approach to the Court's new powers when deciding whether the evidence was credible:

'It is clear that a more liberal attitude than hitherto prevailed was introduced by the provision in section 5 [of the 1966 Act] that the fresh evidence sought to be introduced *shall* be received unless the court is satisfied upon the grounds specified in the section that it ought to be. Nevertheless, public mischief would ensue and the legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this Court when verdicts are being reviewed. There must be some curbs, the section specifies them, and we proceed to consider the present applications with due regard to them.'

This case made it clear that the Court reviewed verdicts, it did not rehear cases which illustrates why fresh evidence cases are treated with such caution. If the evidence was freely admitted then the Court may find itself rehearing the case which it was not allowed to do. In his supplement review of the reported cases of the Court from 1969 to 1973, Knight (1975, p. 43) concluded that 'the promising approach of 1964 – 1969 has not been kept to strictly in the period 1969 – 1973. There are some healthy signs – but also some worrying developments.' He stated that the worrying developments mainly stemmed from Edmund Davies LJ's judgment above.

After a failed attempt to quash the conviction at the Court of Appeal, the case of *R v Stafford and R v Luvaglio* eventually went to the House of Lords on a point of law which clarified the Court's approach to its new fresh evidence powers.¹¹⁴ Previously, as discussed, the objective test the Court applied was whether the original jury might have been influenced by the fresh evidence¹¹⁵ but in *Stafford* the Court adopted a new subjective approach. Lord Cross stated:

'It was argued strenuously by the counsel for the appellants that the Court of Appeal ought to have asked itself expressly whether if the fresh evidence had been given at the trial together with the original evidence the jury might have had a reasonable doubt as to the guilt of the accused and that its failure to ask itself the question vitiated its judgment. I do not agree. Section 2(1)(a) of the Criminal Appeal Act 1968 simply directs the court to allow an appeal against conviction if it thinks that under all the circumstances of the case the verdict is unsafe and unsatisfactory. In a fresh evidence case it is natural for the court to put itself in the position of the jury which convicted on the original evidence and to ask itself whether the addition of the fresh evidence might have induced a reasonable doubt in its mind. But that is only another way of asking whether it

¹¹² [1966] Crim. L.R. 102.

¹¹³ [1968] 53 Cr. App. R. 1.

¹¹⁴ *Stafford v DPP* (1974) A.C. 878.

¹¹⁵ See above, n. 111.

might have induced a reasonable doubt in the minds of the members of the Court if they had constituted the jury.¹¹⁶

The test to be applied was set out by Viscount Dilhorne:

'The court has to decide whether the verdict was unsafe or unsatisfactory and no different question has to be decided when the court allows fresh evidence to be called.....Parliament has, in terms, said that the court should only quash a conviction if, there being no error of law or material irregularity at the trial, 'they think' the verdict was unsafe or unsatisfactory. They have to decide and Parliament has not required them power to quash a verdict if they think that a jury might conceivably reach a different conclusion from that to which they have come. If the court has no reasonable doubt about the verdict, it follows that the court does not think that the jury could have one.'¹¹⁷

This test moved away from an objective one to a subjective one. The Court had to decide whether it thought the new evidence made the conviction unsafe and unsatisfactory with no reference to what a jury would have thought of it.

The *Stafford* judgment has been the subject of much criticism,¹¹⁸ most notably from the former Law Lord, Lord Devlin. In his book, *The Judge* (1979, pp. 158-9), Devlin criticised the approach of the judges on the grounds that the accused now had a mixed trial by judges and jury. He stated:

'They [the judges] did not hear the old witnesses and there are no specific findings about them to be found in the general verdict. So the judges have to decide upon their reliability on the record, fortified by conjectures from the verdict; to reach their verdict, the judges would say, the jury must have believed this or that. In assessing the reliability of the new witnesses...the judges are on their own.'

Devlin went on to say:

'It seems to me that even those judges who are in favour of extending the domain of the judges over the facts must accept that the position which has now been reached is not a satisfactory one. Instead of the re-trial by jury for which Parliament provided in 1964, there is an imperfect re-trial by judges, in which the normal appellate review has been swallowed up.....I do not think that in 1964 Parliament would have taken kindly to a trial by judges alone in fresh evidence cases' (pp. 171-172).

Devlin felt that most cases involving fresh evidence should be sent for retrial before a fresh jury as anything less was a denial of the appellant's constitutional right to trial by jury. Pattenden's view is that Lord Devlin's criticism is based on a crucial assumption

¹¹⁶ See above, n. 114, 907.

¹¹⁷ *Ibid*, 892.

¹¹⁸ See O'Connor (1990, p. 620) and Buxton (1993, p. 74).

that the right to trial by jury persists after a trial has already taken place; the counter view is that a defendant's right to trial by jury is fully satisfied by the original trial (1996, p. 196).

The approach taken by the Lords in *Stafford* was confirmed in 1989 by the Court of Appeal in one of the failed Birmingham Six appeals, *R v Callaghan*.¹¹⁹ The appellants had submitted that the judges should look at the case through the eyes of the jury and if they were to think that the jury might have come to a different conclusion had the jury themselves heard the new evidence then the appeal should be allowed regardless of what the judges themselves thought. The judgment of the Lord Chief Justice indicated:

'Although the Court may test its views by asking itself what the original jury might have concluded, the question which in the end we have to decide is whether in our judgment, in all the circumstances of the case including both the verdict of the jury at trial upon the evidence they heard, the convictions were safe and satisfactory.'

This thus followed *Stafford* and rejected the jury impact test as the method for determining fresh evidence appeals.

Malleson has stated (1996, p. 150) that the *Stafford* decision [House of Lords] appeared to indicate that the Court was extending the application of its powers and taking a more proactive role in reviewing appeals against conviction. But the difficulty this causes is that if the Court is deciding on the basis of what it thinks of the evidence this is essentially usurping the role of the jury. This moves the Court away from its review function towards a rehearing one; it has to decide what the jury thought of the evidence it heard and marry that up with the new evidence the Court has heard and decide whether the conviction is unsafe. This results in, as Lord Devlin states, an imperfect retrial by judges. When this is combined with its deference to the jury and its reverence for finality, it can be difficult to overturn convictions on the basis of new evidence.

The difficulties associated with fresh evidence appeals were discussed by the RCCJ.

The Royal Commission on Criminal Justice

The Royal Commission concluded that the Court's powers under section 23 were adequate but may be being construed too narrowly. The Commission stated it thought it understandable that the Court would view fresh evidence with some suspicion and the Court was right not to wish to encourage defendants to think of the Crown Court trial as a practice run. But on the other hand, the Court must be alive to the possibility that the

¹¹⁹ [1989] 88 Cr. App. R. 40. And then confirmed again in *R v Byrne* [1989] 88 Cr. App. R. 33.

fresh evidence may exonerate the appellant or at least throw some serious doubt on the conviction (ch.10, para. 55).

The Commission stated that it had been suggested in evidence to them that the Court took an excessively restrictive approach to whether the fresh evidence was available at the trial and whether there was a reasonable explanation for the failure to adduce it. They stated that 'we would urge that in general the court should take a broad, rather than a narrow, approach to them' (ch.10, para. 56). It had been suggested to the Commission that the test in section 23(2) that the evidence had to be 'likely to be credible' was too high a test and they recommended that the test should be changed to 'capable of belief' as this would 'be a slightly wider formula giving the court greater scope for doing justice' (ch.10, para. 60).

The Commission discussed the case of *Stafford*, and the criticisms of the decision by Lord Devlin. It agreed that there was some force in Devlin's criticisms and suggested that wherever possible the Court should order a retrial of the case rather than decide the issue for itself as 'the Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the ultimate credibility and effect on a jury of the new evidence' (ch.10, para. 62). But the Commission also stated that where a retrial was impracticable or otherwise undesirable, the Court of Appeal should follow the *Stafford* test and decide the matter for itself rather than just simply allowing the appeal (ch.10, para. 63).

In response to the RCCJ, the Government issued a consultation paper in 1994 (Home Office, 1994). With regard to fresh evidence, the Government accepted the view that if there was a reasonable explanation for the evidence not being adduced at the original trial then the Court should consider the evidence. But 'considers that the Court should continue to have power to exclude evidence where it considers that there is no reasonable explanation' (para. 13). The Government agreed with the recommendation of changing 'likely to be credible' to 'capable of belief.' The Government also agreed that the Court should decide the issue for itself in fresh evidence cases where a retrial was not possible (para. 17).

As discussed in chapter one, the amendment to the Court's fresh evidence powers was confusing as to its aims. The intention behind the amendment to section 23 CAA 1968 by the RCCJ was clearly to widen the basis upon which fresh evidence would be admitted by the Court of Appeal. This seemed to be accepted by the Government when introducing this part of the Criminal Appeal Bill into Parliament. The then Home Secretary stated that "The Bill also lowers the threshold for the admission of fresh

evidence along the lines recommended by the Royal Commission..."¹²⁰ However, when amendments to section 23 were introduced in the House of Lords, Baroness Blatch stated that her understanding from the Lord Chief Justice was that the amendments would not restrict fresh evidence being admitted nor change Court practice.¹²¹ Therefore, there was confusion as to whether these amendments were to liberalise the Court's approach to fresh evidence appeals or to allow the Court to continue what it had been doing prior to the changes in the law. This was a reference to the supposed liberal approach the Court was taking prior to the CAA 1995 as previously discussed.

The amendments to the fresh evidence provisions were in section four of the Criminal Appeal Act 1995 which amended the provisions in section 23 of the 1968 Act. The amendments to section 23 were that the duty to admit new evidence was abolished, but the power to admit new evidence is made subject to a duty to consider the same factors as limited the former duty: credibility, relevance to the safety of the conviction, admissibility at trial and the reasonableness of the explanation for the failure to adduce the evidence at trial. Following the recommendation of the RCCJ, the requirement that new evidence be 'likely to be credible' has now become 'capable of belief.' As under the previous legislation, the Court's power to receive evidence is unfettered, provided it considers it necessary or expedient in the interests of justice to do so regardless of the above factors. The Court's rarely used power to rehear the evidence presented at the trial was abolished.¹²² As Pattenden has stated 'this can only increase the difficulty for the criminal division of the Court of Appeal of deciding whether a conviction is unsafe because of jury error' (Pattenden, 1996, p. 415). The removal of the Court's power to rehear trial evidence reinforces the review function which arguably is what has caused some of the problems in the first place.

The key to the liberalisation of the Court's approach would be whether the overriding consideration is if it is in the interests of justice to admit the evidence regardless of whether the four factors have been satisfied. The restrictive approach of the Court can be demonstrated by undue weight being given to any of the four factors in the face of evidence which may lead to the conviction being unsafe. This was expressed by JUSTICE in their response to the RCCJ report:

'There is clearly a consensus that what is considered as fresh evidence should no longer be subject to the restrictive approach adopted by the Court of Appeal in the past. Our view is that although the Court is entitled to seek and take account of any explanation why evidence which was available was not adduced at the trial, this should not be the determining factor; the test must be a broad one of whether the evidence goes to the safety of the conviction' (JUSTICE, 1994b, p. 6).

¹²⁰ *Hansard*, H.C. Vol 256, Col 25, 6 March 1995.

¹²¹ *Hansard*, H.L. Vol. 565, Col 567, 26 June 1995.

¹²² Criminal Appeal Act 1995, section 4(1)(a).

Therefore, empirical research was needed in this area to determine whether the amendments to the fresh evidence provisions have brought about any changes to the Court's approach to these appeals. As the above shows, the Court's approach to these appeals has largely been described as restrictive, though it has occasionally been acknowledged as taking a liberal approach. But as discussed in chapter three, without a normative baseline in which to measure the Court's approach it can be difficult to determine whether the Court is taking a restrictive or a liberal approach. With that in mind, the judgments in this chapter will be analysed in terms of whether it is possible to say whether the Court is being restrictive or liberal and if so, whether that approach can be attributed to the changes in the 1995 Act.

The sample of judgments from 1990 and 2002 will now be analysed.

The 1990 and 2002 samples of judgments

Malleson had a total of twenty-three cases in her sample in which fresh evidence was raised (7% of the total grounds). Four out of the twenty-three cases involved expert or forensic evidence and sixteen involved witnesses of fact. See table below.

Table 5.1: Type of fresh evidence cases before the Court of Appeal (Criminal Division) January to July 1990

| Type of Fresh Evidence | Allowed | Dismissed/ | Adj'd/ Refused | % Retrial | of total |
|------------------------|----------|------------|------------------------|--------------|----------|
| New witness of fact | 2 | 7 | 1 | 43% | |
| Trial witness of fact | 1 | 4 | 1 | 26% | |
| New expert witness | 0 | 1 | 2 | 13% | |
| Trial expert witness | 0 | 1 | 0 | 4% | |
| Other | 1 | 2 | 0 | 13% | |
| TOTAL (N= 23) | 4 | 15 | 4¹²³ | 100% | |

In fourteen of the twenty-three cases the evidence was admitted by the Court (61%). Of these, Malleson states four were allowed and two were adjourned for a full hearing (being renewed applications).¹²⁴ In two cases retrials were ordered. Therefore, Malleson states that 'the number of appeals which succeeded on the basis of fresh evidence was small, being less than 17% of the total fresh evidence cases and just over 1% of all the

¹²³ There is possibly a discrepancy here. Malleson states in the text that there were 2 cases adjourned for a full hearing and two retrials ordered. It is possible that the 4 cases in this column are those cases. But if so, it is not clear which ones are the cases adjourned and which are the retrials so any comparative figures are taken from the allowed column.

¹²⁴ There is a discrepancy in relation to the figures. Malleson's grounds of appeal table (reproduced at table 4.2 in this thesis) shows fresh evidence figures of 5 appeals allowed, 15 dismissed and 3 adjourned for a full hearing. Table 5.1 reproduced from Malleson's study shows that there were 4 appeals allowed, 15 dismissed and 2 were adjourned for a full hearing. The comparisons carried out between the 1990 and 2002 samples have been done using the fresh evidence table.

cases reviewed' (Malleeson, 1993, p. 9). Malleeson's findings will now be compared with the 2002 sample of judgments.

The 2002 sample had a total of thirty-six cases in which fresh evidence was raised (6% of the total grounds). Thirteen out of the thirty-six cases involved expert or forensic evidence and twenty-one involved witnesses of fact. See table below.

Table 5.2: Type of fresh evidence cases before the Court of Appeal (Criminal Division) January to May 2002

| Type of Fresh Evidence | Allowed | Dismissed/ Refused | Adj'd/ Retrial | % of total |
|------------------------|----------|-----------------------|-------------------|---------------|
| New witness of fact | 0 | 4 | 0 | 11% |
| Trial witness of fact | 4 | 12 | 1 | 47% |
| New expert witness | 3 | 7 | 0 | 28% |
| Trial expert witness | 2 | 1 | 0 | 8% |
| Other | 0 | 2 | 0 | 6% |
| TOTAL (N = 36) | 9 | 26 | 4 | 100% |

In eighteen of the thirty-six cases the evidence was admitted by the Court (50%). Of these, nine were allowed and one adjourned for a full hearing. In three cases, retrials were ordered. Therefore the number of appeals which succeeded on the basis of fresh evidence was 25% which was 3% of all the cases reviewed.

The initial comparisons between the two samples shows that there were more fresh evidence grounds in the 2002 sample (thirty-six) than there were in the 1990 sample (twenty-three). Therefore, the rise in the number of fresh evidence grounds in 2002 could be interpreted as the Court adopting a more liberal approach as arguably more fresh evidence appeals are getting through the leave filter. However, ten of the cases in the 2002 sample were references from the Criminal Cases Review Commission and those cases do not need to go through the leave filter. Therefore, if those cases are deducted from the total, the truer comparison is twenty-six cases in 2002 as opposed to twenty-three cases in 1990. Although three more cases got through the leave filter in 2002 than in 1990 this is not really conclusive proof that the Court is adopting a more liberal approach in 2002.

The rise in fresh evidence grounds could also be explained by a rise in the number of grounds generally with 329 in the 1990 sample and 641 in the 2002 sample. Overall, the percentage of fresh evidence grounds in relation to all the grounds was lower - being 6% in the 2002 sample and 7% in Malleeson's. This shows that whilst the 2002 sample had almost double the number of grounds of the 1990 sample, fresh evidence grounds had

not increased substantially as a proportion of the total grounds.

The 1990 sample indicates that the fresh evidence was accepted by the Court in 61% of cases whereas the 2002 sample shows that the fresh evidence was accepted in 50% of cases. This arguably shows that while more fresh evidence appeals may have got through the leave filter in 2002, the evidence was rejected by the Court in a higher percentage of cases. This is therefore potential evidence that either the single judge is being too generous in granting leave or the full Court is still being restrictive in deciding whether to accept the evidence. It may also be evidence that the Court is not particularly receptive to CCRC referrals. Either way, these figures show that a high proportion of fresh evidence is rejected by the Court, even if it manages to get through the leave filter.

In Malleeson's sample of twenty-three fresh evidence grounds, four were allowed, fifteen were dismissed or refused and two were adjourned for a full hearing being renewed applications to appeal. Therefore of the total grounds, 17% were successful (based on four allowed) with 83% unsuccessful. In the 2002 sample, of the thirty-six fresh evidence grounds, nine were allowed, twenty-six were dismissed or refused and one was adjourned for a full hearing. Therefore of the total grounds, 25% were successful (based on nine allowed) with 75% unsuccessful. Thus, although there were a lower percentage of cases where the fresh evidence was accepted by the Court in 2002, the fresh evidence that was accepted led to a higher success rate with more appeals allowed in 2002. This is potentially evidence of a more liberal approach to deciding whether the appeal will be allowed, even if there is a more restrictive approach being taken to the admitting of the evidence in the first place. Having said that, the sample size is small and differences can be distorted or hidden in such a situation. The figures should, thus, be treated with caution more as possible indicators to be considered in the qualitative analysis rather than as findings *per se*.

There are differences in the type of grounds that were successful. Malleeson states that in the 1990 sample, the most common cases were witnesses of fact with sixteen cases and they were the most successful with three allowed. In contrast, the 2002 sample shows that cases involving witnesses of fact were the most common (twenty-one) but cases involving forensic or expert witnesses were the most successful (with five allowed out of thirteen cases). This is potential evidence for the proposition that there are now more forensic or expert evidence appeals. The 1990 sample does appear to be particularly low on forensic and expert evidence cases (four out of twenty-three) on appeal and it may be that by 2002, this type of evidence was being argued more readily either as a result of advances in psychological testing, psychiatric testing or forensic

science.¹²⁵ This could also indicate that the Court is now more likely to grant leave for this type of evidence than previously.

As well as this quantitative analysis, Malleson also conducted a qualitative analysis of the judgments and this will now be explored and compared with the 2002 sample. The qualitative analysis provides a rich data set that allows an assessment of the merits of the tentative indicators suggested from the descriptive quantitative analysis.

Malleson stated in her study that identifying how the Court deals with the requirements in section 23 was not easy because 'the reasoning behind its decision making process as to relevance, credibility or the explanation for the failure to adduce it at trial was not stated in the judgments' (Malleson, 1993, p. 9-10). She stated that the only clear statement of practice concerned the Court's reluctance to hear new evidence from a witness at the trial citing the case of *Turner* (30/3) (Malleson, 1993, p.10):

'....the mere fact that a prosecution witness chooses to come forward after the trial to assert that his evidence at trial was perjured will rarely provide a basis for permitting him to give evidence or for interfering with the conviction.'

Malleson stated that the explanation for this policy seemed to be concern that if the Court relaxed its approach to the admission of such evidence it would lead to an inundation of fresh evidence cases citing *Haycroft* (15/5) (Malleson, 1993, p. 10):

'To permit additional evidence to be given by a witness who has given evidence at the trial below on such a tenuous foundation would open the floodgates to applications of a similar kind in many appeals.'

Malleson argued that this illustrated that the most commonly produced category of fresh evidence, the retracted statement of a trial witness, was treated with great caution by the Court (Malleson, 1993, p. 10).

Malleson stated that the judgments were less explicit on the issue of how the Court should approach the question of whether there was a reasonable explanation for the failure to adduce evidence at the trial. She said that this question tended to be mentioned in passing or not at all and the Court's reasoning in reaching its decision was never explicitly set out. She explained that where it was mentioned, the distinction between what was reasonable and what was not appeared to be a very fine one (Malleson, 1993, p. 10).

¹²⁵ That was acknowledged in one of the appeals in the sample that involved expert evidence where Auld LJ stated 'we acknowledge the considerable advances over the last two or three decades in psychiatric and psychological research and knowledge and in the use of those disciplines.' *R v Kavanagh* [2002] EWCA Crim 904, para. 56.

Malleson also argued that there was evidence within her sample that the Court clearly adopted the *Stafford* subjective approach in assessing the evidence once it had been admitted by the Court (Malleson, 1993, p. 10). This shows that the use of the jury impact test of the early years of the Court (as evidenced by *R v Parks*) had fallen out of favour. However, there was another major development between the 1990 and 2002 samples which may have had an impact on the way the Court decides the appeal. This was the House of Lords judgment of *R v Pendleton*¹²⁶ which was decided in December 2001. The cases in the 2002 sample were the first to apply it and that case will be analysed below to see if it has made any difference to the Court's decision making process.

In the 2002 sample, of the thirty-six cases, twenty-four discussed the provisions in section 23 of the CAA 1968 (as amended by section 4 of the CAA 1995) and twelve did not mention it at all. In two cases some of the wording of section 23 was mentioned but there was no reference to section 23. As discussed above, the fresh evidence was admitted in eighteen of the thirty-six (50%) cases.

Similarly to Malleson, a reading of the judgments from the 2002 sample where section 23 was considered reveals very little guidance from the Court in terms of how it applies the provisions of that section. There was guidance in one judgment as to the provision of there having to be a reasonable explanation for the failure to adduce evidence at the trial. In *R v Tully*, Kay LJ stated:

'Generally speaking, a defendant will be required to call all the evidence upon which reliance is to be placed at his trial. No system could operate effectively if a defendant could run his trial in one way and then come to the Court of Appeal and suggest he might have done better if he had run it a different way. For example, a defendant could not be permitted to choose not to give evidence at trial and then, if convicted, go to the Court of Appeal and argue that if he had given evidence the jury might have come to a different conclusion. It is for a defendant and his legal advisors to decide what evidence to deploy at trial and the Court of Appeal will not in normal circumstances allow a second bite of the cherry if an unfavourable outcome follows.'¹²⁷

Although the judgments from both the 1990 and 2002 samples show that the judges do not want the appeal to be a second trial, which is why they are accused of adopting a restrictive approach to this factor, there is no guidance given as to what is a 'reasonable' explanation. One of the judgments did give an indication of the differences between expert evidence and evidence of fact in relation to section 23. In *R v Thomas*,¹²⁸ Auld LJ stated:

¹²⁶ [2002] 1 WLR 72.

¹²⁷ *R v Tully* [2002] EWCA Crim 18, para. 118. This was also emphasised in a different judgment in the sample, *R v Biggs* [2002] EWCA Crim 418, para. 20.

¹²⁸ [2002] EWCA Crim 941.

'In the ordinary way the existence of a reasonable explanation for not calling evidence at the trial, to which the Court should have regard when considering whether to receive fresh evidence, has more ready application to factual evidence than to scientific evidence since expert witnesses, though varying in standing and experience, are interchangeable in a way in which factual experts are not.'¹²⁹

This may partly explain the changes in the 2002 sample in that although the most common ground was witnesses of fact, the most successful ground was expert evidence. This trend should continue with the advances in expert evidence and the Court appearing to take a more liberal approach to this evidence under section 23.

In order to provide a more detailed picture of the operation of section 23, the 2002 sample of cases can be divided into those where the evidence was rejected and those where it was admitted. This may provide some indications of what the decision making process of the Court is when deciding whether to admit the evidence. Those cases where the Court refused to admit the evidence will be considered first.

Fresh evidence rejected

As Lord Bingham stated in *R v Pendleton*, the decision to receive the evidence is initially taken by reading a witness statement on paper and applying the provisions of section 23.¹³⁰ The case of *R v Biggs*¹³¹ illustrates a potentially restrictive approach to section 23. The new evidence was a statement from a co-accused. The Court refused to hear the evidence because it was not convinced there was a reasonable explanation for the failure to adduce the evidence at an earlier stage. Kennedy LJ stated in the judgment that it appeared that the statement from the co-accused was not capable of belief but 'of course were we to hear the evidence, we might be persuaded to the contrary effect.' This shows that section 23(2)(d) was the overriding consideration in that case and because of that the Court were not prepared to even hear the evidence which may have resulted in the conviction being overturned. This is the situation JUSTICE hoped would be liberalised after the CAA 1995 so could be evidence that the Court is continuing to take a restrictive approach.

There was further evidence of the Court potentially taking a restrictive approach. In *R v Cleeland*,¹³² which was a very detailed case with 20 grounds of appeal, the evidence of a firearms expert was not admitted because it would not have impacted on the safety of the conviction. In *R v Armstrong*,¹³³ the evidence was not admitted because in the

¹²⁹ *Ibid*, para. 98.

¹³⁰ See above, n. 126, para. 10.

¹³¹ See above, n. 127.

¹³² [2002] EWCA Crim 293.

¹³³ [2002] EWCA Crim 1057.

Court's view most of the evidence had been in the possession of the lawyers at the trial and had already been put to the complainant. In *R v Garner*,¹³⁴ the witness evidence was not admitted because the Court took the view that the witnesses were not capable of giving credible evidence likely to undermine the safety of the conviction. In *R v Allan*,¹³⁵ a statement by a co-accused was not admitted with the Court stating that 'one must be extremely cynical about statements being provided by co-accused post trial seeking to assist another co-accused when they are no longer in a position of being affected by what they might say.'¹³⁶ In *R v McGee*,¹³⁷ evidence from a Doctor whose evidence was read at trial was rejected on the basis that his evidence on appeal would not be considered 'fresh.' In *R v Willington*,¹³⁸ the defendant had pled guilty at trial and wanted to call on appeal the witnesses he would have called had he pled not guilty and had a trial. The Court refused to allow the witnesses to be called. In *R v McKee*,¹³⁹ expert evidence was not admitted as the Court took the view it was not in the interests of justice to receive it. In *R v Smith*, the Court rejected the evidence from two witnesses on the basis that 'we took the view that even if we were to accept every single word of what they say as true, we did not consider that that evidence would afford a ground for allowing the appeal.'¹⁴⁰ In *R v Tully*, the evidence was rejected on the basis that 'if all the material now available had been available at trial, we are satisfied that the case would have taken exactly the same form that it took then and that as a result the outcome would have been no different.'¹⁴¹ In *R v Sanghera*,¹⁴² the Court refused to accept the evidence 'having regard to section 23(2)(d)'. In *R v Burton*,¹⁴³ the evidence of an expert was not admitted because it would afford no ground for allowing the appeal. In *R v Kavanagh*,¹⁴⁴ the expert evidence was rejected because the Court was satisfied that the jury's verdict would not have been affected by the fresh evidence. In *R v Korsarossi*, the evidence of a witness was rejected because 'it seems to us that no explanation, reasonable or otherwise, has been proffered as to why he was not called at the trial.'¹⁴⁵ In *R v Rodger*,¹⁴⁶ the evidence of witnesses was rejected as it would cast no doubt on the safety of the conviction. In *R v Thomas*,¹⁴⁷ the evidence of witnesses was rejected as the Court did not consider it to be 'new.' Finally in *R v Byrne*,¹⁴⁸ the evidence of a co-accused was rejected as it was not capable of belief and it did not afford any ground for allowing the appeal. There was an interesting and extreme twist in reasoning

¹³⁴ [2002] EWCA Crim 1155.

¹³⁵ [2002] EWCA Crim 1055.

¹³⁶ *Ibid*, para. 27.

¹³⁷ [2002] EWCA Crim 1338.

¹³⁸ [2002] EWCA Crim 40.

¹³⁹ [2002] EWCA Crim 1498.

¹⁴⁰ [2002] EWCA Crim 759, para. 25.

¹⁴¹ [2002] EWCA Crim 18, para. 137.

¹⁴² [2002] EWCA Crim 1088.

¹⁴³ [2002] EWCA Crim 614.

¹⁴⁴ [2002] EWCA Crim 904.

¹⁴⁵ [2002] EWCA Crim 1757, para. 31.

¹⁴⁶ [2002] EWCA Crim 660.

¹⁴⁷ [2002] EWCA Crim 941.

¹⁴⁸ [2002] EWCA Crim 1284.

in a case in the 2002 sample. In *R v Hooper*, the Court had not been provided with a witness statement as to what the fresh evidence was going to be:

'However, leaving that aside, assuming that there might have been, though as we know in the event there was not going to be, some evidence from Mr Carpenter; and assuming also that its content would be entirely speculative; in the light of the judge's findings we feel that we would have found it difficult to hold under section 23(2)(a) of the statute that such evidence would be capable of belief.'¹⁴⁹

Here, the Court seems to be rejecting evidence it has not even seen.

A review of these cases reveals that section 23 was discussed when rejecting the evidence in thirteen cases and not discussed in a further five where the evidence was rejected. These cases could show the Court taking a restrictive approach because at this stage the Court is refusing to hear the evidence rather than hearing it and making a decision on it. As these cases show, the Court uses a variety of reasons not to admit it such as it not being capable of belief, it not affording a ground for allowing the appeal, it not being considered new, it being available at trial, no reasonable explanation for it not being at the trial *etc.* As the cases demonstrate, generally a reading of the witness statement is combined with a discussion of whether to admit the evidence under section 23. The Court often makes a decision that the evidence does not comply with section 23 without hearing or seeing the evidence in person. It may be true that a large amount of evidence on paper may seem not capable of belief or would not afford a ground for allowing the appeal, but perhaps a better approach would be to hear the evidence in person before making the decision as to whether it complies with section 23. This way the Court may be persuaded about the cogency of evidence which may not appear, on paper, to be that persuasive. There is very little evidence here that the Court is looking for the merits in the case in terms of whether this person may have been wrongly convicted. As discussed above, the Court's review function prevents it from delving too deeply into the merits of the case and combined with its reverence for finality and its deference to the jury verdict only a small amount of fresh evidence is actually being heard by the Court. But in the absence of a tried and tested method of determining whether these appeals should have been overturned, we can only speculate on whether the Court is taking a restrictive approach in these appeals. The Court appears to be applying a mixture of the jury impact test and *Stafford* to determining whether the evidence should be admitted so either results in the evidence being excluded.

There is evidence that could be construed as a more liberal approach in some instances. There were five judgments in the 2002 sample where the evidence was

¹⁴⁹ [2002] EWCA Crim 621, para. 51.

heard 'de bene esse.'¹⁵⁰ This is where the Court hears the evidence without considering section 23 first. This is potentially more liberal because the cases above show the Court rejecting the evidence using section 23 in the majority of cases. If the evidence is heard 'de bene esse' then it is not subject to the initial section 23 assessment prior to being admitted by the Court. Of those cases, three were allowed, one was dismissed and one was refused leave to appeal. In *R v Baig*,¹⁵¹ the appeal was refused because the Court found that the new evidence could afford no ground for allowing the appeal. In *R v Cartledge*,¹⁵² the appeal was dismissed as the evidence was deemed incapable of belief and was not deemed to have assisted the appellant's case. But in *R v Roberts*,¹⁵³ *R v RF*¹⁵⁴ and *R v Daniel*,¹⁵⁵ the appeals were allowed, suggesting that the appellant has more chance of success if the evidence is heard prior to section 23 being considered rather than the evidence being read on paper and section 23 considered prior to the hearing of it in Court. It is not clear why the Court chose to do this in these cases and not others but if this was general practice then perhaps more appellants would have convictions overturned.

The cases where the evidence was admitted by the Court will now be reviewed.

Fresh evidence admitted

As discussed above, the fresh evidence was admitted in eighteen of the thirty-six cases which equates to 50% of the total fresh evidence cases. Once the evidence is admitted the Court then goes on to decide whether the fresh evidence has made the conviction unsafe. As chapter four showed, the Court has a number of different approaches to determining the appeal. The House of Lords was given the opportunity to clarify the test to be used by the Court when deciding fresh evidence appeals in the case of *R v Pendleton*.¹⁵⁶ The certified question for the House of Lords was:

"Where, on an appeal against conviction, the Court of Appeal receives fresh evidence under section 23 of the Criminal Appeal Act 1968, in determining the safety of the conviction, is the court confined to answering the question, might a reasonable jury have acquitted the appellant had they heard the fresh evidence?"

The case of *Pendleton* was decided in December 2001 and the cases in the sample were the first opportunity for the Court of Appeal to consider the judgment. Therefore, it

¹⁵⁰ This translates into 'for what it is worth.'

¹⁵¹ [2002] EWCA Crim 823.

¹⁵² [2002] EWCA Crim 1306.

¹⁵³ [2002] EWCA Crim 1069.

¹⁵⁴ [2002] EWCA Crim 633.

¹⁵⁵ [2002] EWCA Crim 37.

¹⁵⁶ See above, n.126.

is necessary to outline the judgment before proceeding with an analysis of those cases where the evidence was admitted.

Pendleton and the decision making process

As discussed above, initially the Court applied the objective jury impact test in determining the appeal but the House of Lords in *Stafford* decided the test should be more subjective. The case of *Pendleton* gave the House of Lords the opportunity to overrule the *Stafford* judgment. The Crown relied on the decision in *Stafford* while the appellants relied on the judgment of *R v McNamee*¹⁵⁷ where Swinton Thomas LJ had applied the jury impact test:

'We have.....concluded that the conviction is unsafe because we cannot be sure that the jury would have reached the same conclusion that they were sure of guilt if they had the fresh evidence we have heard. Furthermore the case as presented to us by both sides is very different to that presented at trial.'

The leading speech in *Pendleton* was given by Lord Bingham who discussed the difficulties of the Court's task in relation to fresh evidence appeals as:

'...it will ordinarily be safe for the Court of Appeal to infer that the factual ingredients essential to prove guilt have been established against the satisfaction of the jury. But the Court of Appeal can rarely ever know, save perhaps from questions asked by the jury after retirement, at what points the jury have felt difficulty. The jury's process of reasoning will not be revealed and, if a number of witnesses give evidence bearing on a single question, the Court of Appeal will never know which of those witnesses the jury accepted and which, if any, they doubted or rejected.'¹⁵⁸

Lord Bingham accepted the appellant's submission that the starting point had to be recognition of the jury as the tribunal of fact but he was not persuaded that the House of Lords had laid down any incorrect principle in *Stafford*, 'so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty.'¹⁵⁹ Therefore:

'The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.'¹⁶⁰

¹⁵⁷ [1998] EWCA Crim 3524.

¹⁵⁸ See above, n.126, at para. 16.

¹⁵⁹ *Ibid*, at para. 19.

¹⁶⁰ *Id*.

Donald Pendleton's appeal was allowed on the basis that the Court of Appeal had failed to appreciate that the importance of the fresh evidence was that it would have led to the trial being conducted completely differently:

'Had the jury been trying a different case on substantially different evidence the outcome must be in doubt. In holding otherwise the Court of Appeal strayed beyond its true function of review and made findings that were not open to it in all the circumstances. Indeed it came perilously close to considering whether the appellant, in its judgment, was guilty.'¹⁶¹

Lords Steyn and Hope agreed with Lord Bingham's reasoning but Lord Hobhouse took a differing view, though agreeing that the conviction should be quashed. He felt that changing the test to 'unsafe' had reinforced the reasoning in *Stafford* that 'appeals are not to be allowed unless the Court of Appeal has itself made the requisite assessment'¹⁶² as:

'in my judgment it is not right to attempt to look into the minds of the members of the jury. Their deliberations are secret and their precise and detailed reasoning is not known. For an appellate court to speculate, whether hypothetically or actually, is not appropriate. It is for the Court of Appeal to answer the direct and simply stated question: Do we think that the conviction was unsafe?'¹⁶³

The question after *Pendleton* was what approach the Court of Appeal would follow in fresh evidence appeals; would it be Lord Bingham's supposedly more liberal approach in highlighting the jury impact test or Lord Hobhouse's reinforcement of the supposedly more restrictive *Stafford* approach? The answer is, unsurprisingly, not clear.

Reference to *Pendleton* was made in eight of the 2002 sample cases¹⁶⁴ although the reasoning of Lords Bingham and Hobhouse could be traced through the other cases as the decision making process of the Court tended to be one or the other. The supposed more liberal approach of Lord Bingham is illustrated by cases such as *R v Daniel*,¹⁶⁵ *R v McMillan*,¹⁶⁶ *R v Murphy and Brannan*,¹⁶⁷ and *R v F (RJ)*¹⁶⁸ where the Court quashed the convictions after applying the jury impact test to conclude that if the fresh evidence had been given at trial it might reasonably have affected the decision of the jury to convict the defendant. In the latter case the Court emphasised that the 'determination of where the truth lies, in a matter of this kind, is not one for this Court. It is a matter, invariably,

¹⁶¹ *Ibid*, at para. 28.

¹⁶² *Ibid*, at para. 35.

¹⁶³ *Ibid*, at para. 38.

¹⁶⁴ *R v Murphy and Brannan* [2002] EWCA Crim 120; *R v Izzigail* [2002] EWCA Crim 925; *R v Hanratty* [2002] EWCA Crim 1141; *R v Daniel* [2002] EWCA Crim 37; *R v Hakala* [2002] EWCA Crim 730; *R v McMillan* [2002] EWCA Crim 114; *R v Downing* [2002] EWCA Crim 263; *R v Cleeland* [2002] EWCA Crim 293.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ [2002] EWCA Crim 633.

for a jury.¹⁶⁹ This emphasizes what is known as the *Pendleton* principle of the Court of Appeal intruding on the jury's role in assessing the credibility and reliability of witnesses; the question for the Court is whether the conviction is safe and not whether the accused is guilty. Therefore, the Court is not allowed to substitute its view for the jury's view of the evidence.¹⁷⁰

The reinforcement of the *Stafford* approach of Lord Hobhouse is illustrated by cases such as *R v Hanratty*,¹⁷¹ *R v Akiner*,¹⁷² *R v Izzigil*,¹⁷³ *R v JB*,¹⁷⁴ *R v Hakala*,¹⁷⁵ and *R v Cleeland*¹⁷⁶ where the Court appears to make its own evaluation of the fresh evidence and upholds the appeal. This is despite the Court taking a seemingly liberal approach to the admittance of the fresh evidence in *R v Izzigil* when the Court accepted it despite the fact it was available at the trial and there was no reasonable explanation as to why it was not. In *R v Hakala*, one of the reasons given for the reinforcement of the *Stafford* approach was that:

'The judgment in "fresh evidence" cases will inevitably therefore continue to focus on the facts before the trial jury, in order to ensure that the right question – the safety, or otherwise, of the conviction – is answered. It is integral to the process that if the fresh evidence is disputed, this court must decide whether and to what extent it should be accepted or rejected, and if it is to be accepted, to evaluate its importance, or otherwise, relative to the remaining material which was before the trial jury: hence the jury impact test. Indeed, although the question did not arise in *Pendleton*, the fresh evidence adduced by the appellant, or indeed the Crown, may serve to confirm rather than undermine the safety of the conviction. Unless this evaluation is carried out, it is difficult to see how this court can perform out its statutory responsibility in a fresh evidence case, and exercise its "power of review to guard against the possibility of injustice". However the safety of the appellant's convictions is examined, the essential question, and ultimately the only question for this court, is whether, in the light of the fresh evidence, the convictions are unsafe.'¹⁷⁷

This was cited with approval in *R v Hanratty*¹⁷⁸ where the prosecution sought to adduce DNA evidence on appeal to prove Hanratty's guilt. By using the authorities of *R v Pendleton* and *R v Hakala*, Lord Woolf stated that 'it is clear that the overriding consideration for this Court in deciding whether fresh evidence should be admitted on the hearing of an appeal is whether the evidence will assist the Court to achieve justice' and 'justice can equally be achieved by upholding a conviction if it is safe or setting it aside if it is unsafe.'¹⁷⁹ Counsel for the appellant, Michael Mansfield, had contended that

¹⁶⁹ *Ibid*, at para 44.

¹⁷⁰ For a detailed analysis of the *Pendleton* judgment see *R v Mills and Poole* [2003] EWCA Crim 1753.

¹⁷¹ [2002] EWCA Crim 1141.

¹⁷² [2002] EWCA Crim 957.

¹⁷³ [2002] EWCA Crim 925.

¹⁷⁴ [2002] EWCA Crim 543.

¹⁷⁵ [2002] EWCA Crim 162.

¹⁷⁶ [2002] EWCA Crim 293.

¹⁷⁷ See above, n. 175, at para. 11.

¹⁷⁸ See above, n. 171.

¹⁷⁹ *Ibid*, at para 94.

if the Court was not to exceed its role as a Court of review, it could only receive fresh evidence on behalf of the prosecution if that evidence was being relied upon to rebut fresh evidence introduced on the appeal by an appellant. This argument was not accepted by the Court, partly on the basis that it was not consistent with the decision of *R v Craven* (not in the sample).¹⁸⁰ In *Craven*, a large amount of material had not been disclosed to the defence and Latham LJ had stated that 'we are entitled, as it seems to us, to consider whether the material which was withheld could have affected the jury's verdict in the light of all the facts now known to this Court' and 'we acknowledge that in carrying out this exercise we are trespassing upon what at trial would be the function of the jury. But that is the inevitable consequence in any case involving fresh evidence.'¹⁸¹ In this case the Court appeared to be convinced of the appellant's guilt as there was a DNA match with the appellant's blood taken from the shirt of someone close to the victim at the time of an attack.

In *Hanratty*, Mansfield argued that Latham LJ's approach was inconsistent with *R v Pendleton* but this was rejected by Lord Woolf who stated that Latham LJ's general approach could be satisfactorily reconciled with that of Lord Bingham in *Pendleton*. However, it would appear that the Court of Appeal in *Hanratty* and *Craven* did what the House of Lords in *Pendleton* had criticised the Court of Appeal in *Pendleton* of doing which was to stray beyond its true function of review and make findings which were not open to it in all the circumstances. Indeed it came perilously close to considering whether the appellant, in its judgment, was guilty. This can be implied by Lord Woolf's conclusion that '...for reasons we have explained the DNA evidence establishes beyond doubt that James Hanratty was the murderer.'¹⁸² And Latham LJ's conclusion that 'the only reasonable inference from [the blood stain] is that he was the person who thrust the glass at Penny Laing thereby killing her.'¹⁸³ In *Pendleton*, this approach resulted in the conviction being quashed but in *Hanratty and Craven* it resulted in the appeal being upheld which implies that the Court is permitted to do this when adducing prosecution evidence to uphold the appeal but should not when deciding whether fresh evidence adduced by the appellant has made the conviction unsafe. This is illustrative of the Court's inconsistency and contradictions. These decisions are also difficult to reconcile with the Court's review function as it would appear that these should be decisions for a jury. In *Hanratty's* case it would be impossible to have a retrial because of the age of the case and the fact that he is dead would arguably make it not in the interests of justice to do so. But this case shows that when the Court is deciding the issue for itself it does appear to usurp the function of the jury. But it does so from an inferior position of not seeing or hearing the witnesses.

¹⁸⁰ [2001] 2 Cr App R 12.

¹⁸¹ *Ibid*, at 34.

¹⁸² See above, n. 171, at para 211.

¹⁸³ See above, n.180, at para. 100.

The case of *R v Hanratty* can be contrasted with that of *R v Downing*.¹⁸⁴ Stephen Downing was convicted of murder. The new evidence on appeal was from experts relating to blood staining. Downing reported that he knew a woman had been attacked and he was found at the scene as he worked in the cemetery where she was found. He had blood on him at the time. During police questioning he admitted he had killed her (he also admitted this to various Doctors) but during the trial he said that was not true but he then admitted finding her after the attack and touching her breasts and between her legs. The new evidence on appeal consisted of expert evidence that the blood staining may have happened when he found her after the attack. This had not been fully discussed at the trial in 1974. The other evidence on appeal was that the confession should have been excluded from the trial because of the oppression with which it was obtained. The Court quashed the conviction on the basis of the expert evidence on blood staining and the fact that the confession evidence was not challenged at the trial. During the judgment, Pill LJ stated:

'This court is aware of the unlikelihood, on the face of it, of someone sexually assaulting a badly injured woman, as the appellant admits he did, unless it was he who had previously disabled her with sexual assault in mind. This court is also aware of the confessions he made to several doctors in circumstances very different from those in the police station. The presence of the appellant near the scene and the nature of the weapon must also be borne in mind. It is not, however, for this court to speculate as to what might have happened had the fundamental defect, which we find to have existed in the conduct of the trial, not been present. As Lord Bingham had recently underlined in *R v Pendleton* "the question for its [the Court of Appeal's] consideration is whether the conviction is safe and not whether the accused is guilty." In the somewhat bizarre circumstances of this case we expressly do not address ourselves to the latter question.'¹⁸⁵

It would appear by mentioning this that the Court considered this to be potentially evidence that Downing had, in fact, committed the crime. But clearly the admission of the confession was the overriding factor when deciding the conviction was unsafe. In other cases in the sample,¹⁸⁶ the new evidence was rejected on the basis of other strong prosecution evidence which appears to give the view that the evidence was rejected because the Court's view was the appellant committed the crime so the conviction was not unsafe. In *Hanratty*, the Court clearly takes the view that he was guilty and upholds the conviction. It would appear that Downing was fortunate to have his conviction quashed.

The case of *Pendleton* does reinforce the view that the Court should be deciding on safety and not guilt but how this works in practice is very difficult to ascertain. If the Court is deciding on the validity of new evidence and deciding whether this made the

¹⁸⁴ [2002] EWCA Crim 263.

¹⁸⁵ *Ibid*, para. 56.

¹⁸⁶ *R v McKee* [2002] EWCA Crim 1498 and *R v Thomas* [2002] EWCA Crim 941.

conviction unsafe, it is difficult to know what the thought process is if it is not one of whether the appellant committed the crime. For those cases in the sample where the jury impact test was applied, the decision making process is more transparent in terms of considering whether, if the jury had that evidence, would they have found the defendant guilty? That is not to say the conclusions on that matter are transparent as the Court is making assumptions about jury decision making that cannot be tested. But at least it is easier to determine what thought process is being used. When the Court is deciding the issue for itself, it is difficult to work out what else it is deciding on other than the guilt of the appellant or whether it believes the person should have been convicted. If the Court is deciding that the new evidence would not have made any difference to the jury verdict it is presumably agreeing that the verdict would still have been one of guilty. This is particularly difficult for fresh evidence appeals because the appellant is essentially arguing that he/she did not commit the crime so by implication the Court is being asked to either agree with the adjudication of guilt by the jury and if not, quash the conviction. Either way, the usurpation of the role of the jury in deciding the issue is inevitable as illustrated above by Latham LJ in *R v Craven*. This can be illustrated by looking at those cases in the sample where the Court decides the issue for itself and allows the appeal.

The Court appeared to take a liberal approach in *R v Roberts*.¹⁸⁷ The appellant was convicted of murder and at trial ran a defence of diminished responsibility and provocation. The new evidence heard *de bene esse* was that of psychiatrists giving evidence as to the appellant's personality traits. The argument on appeal was that the defence of provocation had not been properly put to the jury and the psychiatric evidence was evidence of the defendant's characteristics which the jury had not considered in relation to provocation. The Court's conclusion was that provocation was not adequately canvassed before the jury. The Court accepted that this evidence was not new as there was evidence before the jury of the defendant's characteristics for the purposes of diminished responsibility. Therefore, the jury had been aware of the defendant's abnormality of mind but had dismissed the defence and convicted him of murder. The Court stated that if the evidence at the trial, and the new psychiatric evidence on appeal which had reinforced the psychiatric evidence before the jury, had been appreciated there would have been a realistic prospect that the trial jury would not have excluded provocation. The Court substituted a manslaughter conviction for one of murder. This seems a particularly generous decision when there was psychiatric evidence before the jury and the defence of provocation had been left to them. Whilst the Court had heard 'new' psychiatric evidence on appeal this merely reinforced what the jury had previously considered when rejecting the defence. It seems here the Court was disagreeing with that jury decision and proceeding on the basis that provocation

¹⁸⁷ [2002] EWCA Crim 1069.

should have been successful. This shows the Court can intervene when it wants to but does not do this too often.¹⁸⁸

There are other cases which potentially show a more liberal approach. In *R v GB*,¹⁸⁹ the Court heard evidence from a witness who claimed that the complainant in a rape case had told her that she had made the whole thing up. The Court took the view that this was 'highly material evidence' and concluded that that made the conviction unsafe; in *R v Higgins*,¹⁹⁰ the new evidence was witness statements that had not been handed over to the defence under the disclosure provisions. The Court quashed the conviction on the basis that 'the evidence that it was sought to call before us is certainly suggestive of the possibility of a real miscarriage of justice';¹⁹¹ in *R v Demir*,¹⁹² the Court accepted the evidence of a person who had done some work on a video recording to enhance it for the purposes of being able to identify whether the appellant was the person who committed a stabbing. It was accepted that his opinion on the parties identified on the film was a non-expert opinion. The conviction was quashed and a retrial ordered. There was no discussion in the judgment as to why this evidence was not available at the trial.

These cases potentially show that the Court is capable of adopting a liberal approach when deciding the issue for itself in line with *Stafford* and it is not just applying the jury impact test that results in quashed convictions. The jury impact test resulted in four convictions being quashed, but the Court deciding the issue for itself resulted in five convictions quashed out of nine with one leave to appeal granted. Therefore, the jury impact test does not necessarily provide a more liberal approach to deciding to allow the appeal which may be unfortunate for those appellants whose counsel argue for it as a more acceptable way of disposing with the appeal because of the Court's review function.

The position in relation to fresh evidence after the 2002 sample will now be discussed in order to ascertain whether there have been any developments.

Fresh evidence after 2002

A review of the reported judgments after the 2002 sample shows the situation with regard to *Pendleton* is, unsurprisingly, contradictory. Just as in the 2002 sample, there are judgments where the jury impact test has been used and there are judgments where the *Stafford* approach has been used. What is clear is that the jury impact test has been used far more often with Lord Bingham's test cited as the one to apply generally in those

¹⁸⁸ This case can be contrasted with *R v Bedford* [2002] EWCA Crim 893. In this case the Court was asked to substitute a conviction of murder for manslaughter on the basis of provocation but the Court declined stating that provocation was a matter for the jury and not the Court and a retrial was ordered.

¹⁸⁹ [2002] EWCA Crim 1483.

¹⁹⁰ [2002] EWCA Crim 336.

¹⁹¹ *Ibid*, para. 19.

¹⁹² [2002] EWCA Crim 774.

cases. This does not necessarily mean that the conviction will be quashed when that test is used over *Stafford* as, as the 2002 sample shows, both approaches result in quashed convictions.

The Stafford approach

The *Stafford* approach was reinforced in the judgement of *R v Ahmed*.¹⁹³ In that case, Mantell LJ referred to the case of *R v Hakala* and also *R v Hanratty* which had both approved *Stafford* and cited with approval the speech from Judge LJ in *R v Hakala* above.¹⁹⁴ He stated 'as is shown in *Pendleton* and *Hakala* it is for this Court to decide whether or not the evidence should be accepted. If it is accepted, the question is then as to its impact on the safety of the conviction.'¹⁹⁵ This case illustrates the problematic nature of fresh evidence appeals. The new evidence was recordings of telephone conversations between the appellant's sister and a witness at trial. The telephone conversations apparently revealed the witness saying she had given false evidence at trial and she gave the name of the person who committed the murder. On the appeal, the Court heard the tape recordings and the trial witness appeared in the Court via video link and was examined in chief by the Crown and cross-examined on behalf of the appellant. The witness told the Court she had spoken the truth at the trial. The Court weighed up the evidence given at trial and concluded the witness was telling the truth at the appeal and was lying in the telephone conversations. The Court was satisfied that she lied during the telephone conversations because she was being threatened and decided to dismiss the appeal. It appears in this case that the Court of Appeal is intruding on the jury's role in assessing the credibility and reliability of witnesses which directly contradicts the *Pendleton* principle. In *Pendleton*, the House of Lords quashed the conviction because it had held that the Court of Appeal had erroneously assessed the credibility and reliability of witnesses. But it appears that this was acceptable for the Court to do this in *Ahmed*. This should arguably have gone to retrial so the jury could make the determination of whether she was truthful rather than the Court.

The Privy Council had the opportunity to review *Pendleton* in *Dial and Dottin v The State*.¹⁹⁶ This was a death row case from Trinidad and Tobago. There was undisputed information that an identification witness had lied at trial. The majority (three-two) dismissed the appeal and Lord Bingham was in the majority. Lord Brown gave the leading judgment and stated:

'Wherever fresh evidence establishes that a material prosecution witness has told a lie, the question arising for the appeal court's determination is whether that realistically places the appellant's guilt in reasonable doubt; whether, in other words, the verdict is now to be regarded as unsafe. That necessarily must

¹⁹³ [2002] All ER (D) 80.

¹⁹⁴ See above, n. 175.

¹⁹⁵ See above, n.193, para 37.

¹⁹⁶ [2005] UKPC 4.

depend upon *all* the evidence in the case. However barefaced the lie and however central to the prosecution case the witness who told it, the Court of Appeal is bound in law to address that question. Even in a case of capital murder it cannot be right to allow an appeal, without more, simply on the basis that the State's main witness has later been shown to have told an outright lie.

The court is not in such circumstances exonerated from undertaking its analytical task. And if it remains sure of the appellant's guilt and upholds his conviction, the court is not thereby to be regarded as having deprived the appellant of due process.¹⁹⁷

Brown outlined the approach to use when determining fresh evidence appeals. He stated:

'In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself, and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict' (Pendleton at p 83, para [19]). The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford* (at p 906) and affirmed by the House in *Pendleton*:

'While ... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].'¹⁹⁸

It is not clear from this whether Lord Bingham was now retreating from his views in *Pendleton* and following Lord Hobhouse's line of reasoning in *Pendleton* which reinforced *Stafford*. There were two dissenting judgments from Lords Steyn and Hutton which appeared to emphasise the jury impact test of *Pendleton*.

There have also been further cases that have followed Lord Hobhouse's reinforcement of *Stafford*. In *R v L*,¹⁹⁹ part of the fresh evidence was a file belonging to the National Society for the Prevention of Cruelty to Children to whom one of the complainants had complained about her Uncle who was convicted of raping her. Moses LJ stated:

'It must be emphasised that the task of this court is not primarily focussed on the question whether the disclosure of the file would have had an effect on the jury's consideration. As to that there can be little doubt. But, as *R v Pendleton* emphasises, the task of this court is to consider whether, in the light of the fresh evidence, the conviction is unsafe.'²⁰⁰

¹⁹⁷ *Ibid*, paras. 42 and 43.

¹⁹⁸ *Ibid*, paras 31 and 32. The cases cited were *R v Hakala*; *R v Hanratty* and *R v Ahmed* as authority.

¹⁹⁹ [2005] All ER (D) 128.

²⁰⁰ *Ibid*, para. 22.

The Court decided in that case that it did not think the conviction was unsafe. In *R v Steele and others*,²⁰¹ the fresh evidence involved a witness who had made contact with the media about his involvement with the murder case. The Court reviewed *Pendleton* and decided that the convictions were safe without any reference to the jury impact test. In *R v Malkinson*,²⁰² the Court followed *Dial and Dottin*. Gage LJ stated:

‘We remind ourselves that when receiving fresh evidence, the essential question for this court, and ultimately the only question for this court, is whether, in the light of the fresh evidence, the convictions are safe.’²⁰³

In *R v B*,²⁰⁴ Moses LJ followed his judgment in *R v L* and reiterated his reinforcement of *Stafford*. The appeal was allowed and he stated:

‘The correct test to be applied by the Court of Appeal when considering whether or not to allow an appeal against conviction where fresh evidence had been received on the appeal was the effect of the fresh evidence on the minds of the members of the court, and not the effect that it would have had on the minds of the jury. The test was whether the conviction was safe and not whether the accused was guilty.’

This seems to be saying that if the Court is applying the jury impact test, it is assessing the new evidence in relation to whether the appellant is guilty or not but if the Court is assessing the new evidence itself it is then deciding if the conviction is unsafe. This would clearly separate the role of the jury and the role of the Court. But it is difficult to establish what the Court is considering when deciding if the conviction is unsafe other than whether the appellant is guilty. As Lord Brown stated in *Dial and Dottin* above, the decision in relation to fresh evidence is ‘whether that realistically places the appellant’s guilt in reasonable doubt; whether, in other words, the verdict is now to be regarded as unsafe.’ This seems to imply that the test of safety is whether the new evidence raises a reasonable doubt about guilt; if it does the conviction should be quashed and if it does not the conviction should be upheld. This should be the same whether the Court applies the jury impact test or the *Stafford* approach. It is difficult to see how the Court decides the conviction is unsafe without making its own assessment of the guilt of the defendant. If this is the decision making process then it is hard to see how the Court is one of review only in fresh evidence appeals.

Although the cases above show that the *Stafford* test was still being applied after *Pendleton*, and applied authoritatively in the Privy Council case, there are numerous cases to show that the jury impact test was also being applied to cases both allowed and dismissed.

²⁰¹ [2006] All ER (D) 308.

²⁰² [2006] EWCA Crim 1891; [2006] All ER (D) 93.

²⁰³ *Ibid*, para. 37.

²⁰⁴ [2007] All ER (D) 445.

The jury impact test

A review of the reported fresh evidence cases that applied the jury impact test after the 2002 sample do not reveal any major differences from those discussed in the 2002 sample. Also, there do not appear to be any obvious reasons as to when this test will result in the conviction quashed and when it will result in the conviction being upheld. Those cases where the conviction was quashed will be considered first.

There were a number of cases where the Court used the jury impact test to quash the conviction. For example, in *R v Dennis and others*,²⁰⁵ *R v Aspery*,²⁰⁶ *R v Jenkins*,²⁰⁷ *R v Nawaz and others*,²⁰⁸ *R v P*,²⁰⁹ *R v Vennett-Showers and others*,²¹⁰ *R v Holdsworth*,²¹¹ *R v Cadman*,²¹² *R v A*,²¹³ *R v Cullen*,²¹⁴ *R v Devaney*,²¹⁵ and *R v Wickens*,²¹⁶ the Court decided the evidence may have had an impact on the jury and quashed the convictions. Some guidance on the Court's decision making was given in *R v Maynard and others*,²¹⁷ In this case, evidence was given by a forensic document examiner who examined the original police interviews and discovered that some of the records were fabricated. There was also evidence from a trial witness saying he had lied at the trial. The prosecution barrister, Victor Temple QC, argued that if the jury had accepted the police evidence as truthful, then it must have accepted the discrepancies as errors. The Court reviewed the speeches of both Lords Bingham and Hobhouse in *Pendleton* and Mantell LJ stated:

'In our view the argument of Mr Temple that the jury must have concluded that the police had made a mistake with the recording times, requires us to "look into the minds" of the jury and speculate as to their reasoning in a way that is clearly forbidden by *Pendleton*. We ask ourselves instead whether the evidence of Dr Hardcastle, if given at trial, might reasonably have affected the decision of the trial jury to convict.'²¹⁸

But later on he stated:

'if the jury had cause to think that the record in the hard backed books on any one occasion had been fabricated, it is at least likely that they would come to doubt the integrity of all the interviews regardless of whether they had been

²⁰⁵ [2004] All ER (D) 05.

²⁰⁶ [2004] All ER (D) 183.

²⁰⁷ [2004] All ER (D) 295.

²⁰⁸ [2007] All ER (D) 200.

²⁰⁹ [2007] All ER (D) 296.

²¹⁰ [2007] All ER (D) 285.

²¹¹ [2008] All ER (D) 03.

²¹² [2008] All ER (D) 43.

²¹³ [2006] All ER (D) 431.

²¹⁴ [2003] All ER (D) 151.

²¹⁵ [2003] All ER (D) 63.

²¹⁶ [2003] All ER (D) 208.

²¹⁷ [2003] All ER (D) 481.

²¹⁸ *ibid*, para 50.

conducted by the same officers who had been involved in the first Dudley interview.²¹⁹

This appears to be speculating about jury decision making and it is not clear from fresh evidence appeals when it is or not acceptable to do this.

There was further evidence of a more liberal approach in *R v Dallagher*,²²⁰ where new evidence as to the reliability of ear print evidence was accepted by the Court as it was 'necessary and expedient in the interests of justice' to receive it and in *R v Fagan*,²²¹ the new evidence was heard *de bene esse*. The Court reviewed *Pendleton* and Thomas LJ, in response to the question of whether the new evidence might reasonably have affected the decision of the jury to convict, stated:

'Answering that question it seems to us that once it is accepted that we cannot say that her evidence is incapable of belief, it must follow that a jury might take the view that in the light of her evidence it might have made a difference to their decision to convict.'²²²

And in response to the evidence from another witness, Thomas LJ stated 'we would be usurping the function of a jury if we were to conclude that her evidence was not capable of belief.'²²³ But under section 23, the Court has to decide whether the evidence is or not capable of belief. This seems to be saying that it is for the jury to determine whether the evidence is or not capable of belief and whilst the jury do that at trial, the Court is asked to do that on appeal which is yet more evidence of the Court's confusing role in fresh evidence appeals. The appeal in that case was allowed.

These cases all show that the Court is able to be liberal on occasion. The cases where the evidence is admitted *de bene esse* or in the interests of justice without considering section 23 are all evidence of a liberal approach as some of these were. However, there are not that many of those. These cases are all examples of evidence leading to the appeal being allowed because the evidence may have had an impact on the jury, however there are no clear guidelines as to why this may be. The Court's consistent claim that it decides whether the conviction is unsafe and not whether the appellant is guilty gives rise to a number of judgments where the Court says it cannot speculate on the decision making process of the jury at trial. But it then appears to do just that when deciding that the new evidence may have had an impact on their decision at trial. It is not entirely clear how the Court is able to decide whether the fresh evidence may have had an impact on them without trying to ascertain why they made the decisions they did

²¹⁹ *Ibid*, 53.

²²⁰ [2002] All ER (D) 383.

²²¹ [2008] EWCA Crim 2014.

²²² *Ibid*, para. 37.

²²³ *Ibid*, para. 36.

with the evidence they heard and how this new evidence would have influenced that decision. The cases since the 2002 sample that have applied the jury impact test to dismiss the appeal will now be examined.

These appeals all potentially show the Court to be taking a restrictive approach. In *R v Maloney*,²²⁴ the appellant was convicted of murdering his wife who was found crushed under the wheels of his car. The CCRC had referred the case with new evidence of an expert on traffic accidents. The Court considered whether it should receive the evidence and warned the CCRC against referring cases on the basis of the jury impact test. Auld LJ stated:

'The material test for the Court both in considering whether to "receive" the evidence of Dr. Lambourn under section 23(1) and the appeal itself is whether, under section 23(2)(b), "it may afford any ground for allowing the appeal", that is, for holding the conviction to be unsafe. The issue of unsafety, which by the very meaning of the word, makes it difficult to distinguish from the notion implicit in section 23(2)(b) of possible unsafety, is one for the Court in the light of the evidence before the jury and the proposed fresh evidence; see *R v Trevor* [1998] Crim L.R. 652. The issue is not whether the Court considers, in the light of the proposed fresh evidence, that a jury might conceivably have reached a different decision if it had heard it. So, the Commission and the Court should beware against adopting, consciously or unconsciously, a train of thought that unless they can be certain the jury would have convicted had they heard the proffered fresh evidence, the conviction must be unsafe. However, the Court, in a case of any difficulty should usually "test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the jury to convict" - "the jury impact test"; see *R v Pendleton*, per Lord Bingham of Cornhill at paras. 18 - 19, and *R v Hanratty*, at para. 93, citing the judgment of Judge LJ in *R v Hakala* [2002] EWCA Crim 730 at para. 11.²²⁵

This seems to be sending a warning to the CCRC that the general approach of the Court is the *Stafford* one so they should guard against just referring a case on the basis of the jury impact test. These two approaches may cause difficulty for the CCRC if they think that the Court may not be persuaded by the evidence but think the jury might be and refer on that basis. It makes their job of applying the 'real possibility' test much more difficult.

There were further cases where the appeal was upheld because the Court felt the evidence would not have had an impact on the jury. For example, in *R v Ambler*,²²⁶ *R v Bartrip*,²²⁷ *R v Harper*,²²⁸ *R v Barnes*,²²⁹ and *R v Rogers*.²³⁰ In *R v Probyn*,²³¹ the facts were very similar to *R v Maloney* above. The appellant was convicted of murdering his

²²⁴ [2003] All ER (D) 277.

²²⁵ *Ibid*, para. 45.

²²⁶ [2003] All ER (D) 206.

²²⁷ [2005] All ER (D) 420.

²²⁸ [2005] All ER (D) 134.

²²⁹ [2008] All ER (D) 268.

²³⁰ [2006] All ER (D) 57.

²³¹ [2005] All ER (D) 27.

wife whose body was found in a car in a river. The prosecution case was that he had propelled the car into the river after having made his wife unconscious. The evidence was heard *de bene esse* and consisted of a witness who specialised in traffic accident reconstruction to show that she had ended up in the river by accident. The appeal was dismissed and Scott Baker LJ stated:

'We bear in mind the warning of Lord Bingham that the test is not whether we think the appellant is guilty but whether the conviction is safe. Whilst we cannot look into the minds of the jury we cannot disregard the very considerable circumstantial evidence which remains untouched by the fresh expert evidence. The fresh evidence is based on assumptions, which in our judgment provide an insufficiently firm foundation for that evidence to have affected the jury's decision to convict.'²³²

Scott Baker LJ seems to be saying here that the appeal is dismissed because there is other circumstantial evidence in the case and also because the fresh evidence is not strong enough to have made a difference to the jury's decision. As he acknowledges, if the Court is not to look into the minds of the jury, this does appear to be making assumptions about what the jury would have decided. If the Court feels the circumstantial evidence is strong then it is saying that the jury would have too and the new evidence would not have had a difference. But how the Court makes this decision without looking into the minds of the jury is not clear.

There were cases that were rejected as it appeared the Court did not believe the evidence. In *R v H*,²³³ the appellant argued on appeal that the complainant, his adopted daughter, had made an earlier allegation of rape against him which she had admitted was untrue. He had been convicted of raping her. Counsel for the appellant had a sworn statement that neither he nor his solicitors had known about the retraction of an earlier allegation. The Court rejected this evidence on the basis that it was not 'fresh' or 'new' as whilst it was willing to accept the appellant's lawyers did not know about the retraction it clearly did not believe that the appellant did not know. Also, in *R v Speake*,²³⁴ a witness' evidence was dismissed for not being capable of being credible or of affecting the jury's decision. These cases seem to directly contradict Thomas LJ in *R v Fagan* above when he said 'we would be usurping the function of a jury if we were to conclude that her evidence was not capable of belief.' It appears in these cases the Court is deciding whether the evidence is credible which according to Thomas LJ is usurping the role of the jury but section 23 requires the Court to decide whether the evidence is capable of belief. This all adds to the confusion around how the Court decides fresh evidence appeals and is evidence of its inconsistency.

²³² *Ibid*, para. 80.

²³³ [2002] All ER (D) 296.

²³⁴ [2003] All ER (D) 49.

These cases show that the jury impact test is as capable of resulting in convictions being upheld as it is in them being quashed. Although the general view is that the jury impact test is preferable because the Court deciding the issue for itself is more likely to lead to a usurping of the role of the jury, these cases appear to be weighing up what the jury would or would not make of the evidence so it is not overly clear what the differences are between the approaches. It is fairly clear that the jury impact test is now being used far more often than the *Stafford* approach. It is also fairly clear that the jury impact test does not result in a necessarily more liberal approach because the number of convictions quashed and upheld was fairly even. If there were differences between the approaches in terms of the numbers they were negligible.

Summary

The evidence as to whether the Court is adopting a more liberal approach in the 2002 sample is contradictory. In the 1990 sample, there were twenty-three fresh evidence cases and in the 2002 sample there were thirty-six. This appears to mean either that more fresh evidence appeals are being brought to the Court or that more of the existing number are getting through the leave filter. But the introduction of the CCRC has clearly had an impact on this ground of appeal as ten of the cases in the 2002 sample were CCRC referrals. As these cases do not need to go through the leave filter, it is difficult to argue that the greater number of appeals in the 2002 sample is an indication of a more liberal approach to the leave procedure.

During the leave process, the fresh evidence is considered on paper and it is also considered on paper in the appeal before the Court decides to admit the evidence. In 1990 the evidence was admitted in 61% of appeals and in 2002 it was admitted in 50% of appeals. Therefore, whilst there are a larger number of fresh evidence appeals in the 2002 sample, the evidence was admitted in fewer appeals. This is potentially illustrative of a more restrictive approach in 2002. There is clearly the potential for problems with the Court assessing the new evidence on paper. The Court generally uses the factors in section 23 to dismiss evidence which can result in evidence being rejected which may have been accepted if the judges had heard it in person. There are cases where the Court hears the evidence in the interests of justice without considering the factors in section 23 such as cases where the evidence is heard *de bene esse*. This potentially shows a more liberal approach because the appellant does not have to cross the hurdle of section 23 prior to the evidence being admitted. But these cases are rare with this power not being consistently used. It is also not clear why it is used in some appeals and not others. The factor in section 23 which appears to remain the most problematic for appellants is the failure to adduce the evidence during the trial. If the Court takes the view there was no reasonable excuse as to why it was not in the original trial it will uphold the appeal even without hearing the evidence. The difficulty for appellants is that

there is no clear guidance on what is considered to be a 'reasonable' excuse and strong evidence of innocence may be excluded on the basis that it was available at trial.

In 1990, there were four appeals allowed, fifteen dismissed or refused and two adjourned for a full hearing. This equates to a success rate of 17%. In 2002, there were nine appeals allowed, twenty-six dismissed or refused and one adjourned for a full hearing. This equates to a success rate of 35%. This shows that despite evidence being admitted in fewer appeals in 2002, there was a much higher chance of success in 2002. This is potentially evidence that the Court was taking a more liberal approach to deciding the appeal in 2002 even if it was taking a more restrictive approach to admitting the evidence initially.

Both samples had the same most common ground being witnesses of fact. However, in the 1990 sample these were the most successful but in the 2002 sample, expert evidence was the most successful. This could be proof that there are now more appeals brought on this basis and therefore more are likely to get through the leave filter. It could also be proof that this type of evidence is more likely to be admitted by the Court. It is also potentially evidence that the CCRC may be having an impact on this type of evidence. If the Court is taking a more liberal approach to these appeals then this is partly explained by the approach the Court takes to expert evidence and section 23 with section 23 not being adhered to as strictly as it is with witnesses of fact.

The decision making process is divided into the *Stafford* subjective approach or the objective jury impact test. As Malleson's sample showed, the *Stafford* approach had taken over from the earlier jury impact test approach. But as the 2002 sample showed, the case of *Pendleton* had an impact on the Court in reaffirming the jury impact test. However, *Pendleton* was not mentioned in every case and some of the judges were clearly still applying the *Stafford* approach. Although leaving the judges to determine the appeal as they wish does give flexibility, it shows the inconsistency of the decision making process. As the comments of Lord Devlin above show, the jury impact test is generally accepted as the preferred approach as the Court is supposedly not usurping the role of the jury when applying it. But the judgments are not clear as to whether the Court is or is not usurping the role of the jury. The judgments often make reference to the Court's role of deciding if the conviction is unsafe and not deciding if the appellant is guilty, but when deciding if the conviction is unsafe, the Court must be deciding if the new evidence raises a reasonable doubt about guilt. If this is the decision making process, then the Court is usurping the jury's role when deciding whether the conviction is unsafe based on new evidence. But this is to some extent inevitable in these appeals as the Court is deciding on evidence that was never before the jury. This will be

discussed in more detail in chapter nine when proposals to reform the Court are also discussed.

The cases in the 2002 sample show that the *Stafford* approach was more likely to result in the conviction being quashed so the jury impact test was not necessarily a more liberal approach though the differences in number were small. The cases after 2002 show that the *Stafford* test is still being used and was, indeed, reaffirmed by the Privy Council in *Dial and Dottin*. The majority included Lord Bingham who had earlier emphasised the jury impact test in *Pendleton*. This may be evidence that Lord Bingham was now rejecting his earlier pronouncements of the jury impact test in *Pendleton* as the dissenting judges, Lords Steyn and Hutton, both argued should be the approach to fresh evidence appeals. But the speech of Lord Bingham in *Pendleton* was essentially saying that the *Stafford* approach was the correct one and the Court may use the jury impact test in cases of difficulty to confirm what the judges had decided themselves. This is not changing the fresh evidence test from *Stafford* to the jury impact test completely so it is not surprising that *Stafford* continues to be used after *Pendleton*. It is not clear from the judgments what is meant by 'in cases of difficulty' but the jury impact test is certainly being used more often after the 2002 sample. This appears to show that the Court may find it an easier decision making process because where the Court is deciding the issue for itself it is making its own subjective decision on what it thinks of the evidence which is straying into jury territory. But the difference between what the jury decides at trial and what the Court decides on appeal is not clear. The Court appears to be speculating about decisions the jury made at trial and coming to its own conclusions about what it thinks of the trial evidence and the new evidence. On this basis, what is the difference between the jury deciding on guilt and the Court deciding on safety as it would appear they are the same thing? Again, this will be discussed further in chapter nine with proposed reforms.

The cases in the 2002 sample and after the 2002 appear to confirm Malleeson's findings that:

'Taken together, the quantitative and qualitative data show that fresh evidence cases are rare and treated with great caution by the Court. Only in very limited circumstances will such evidence be admitted and if admitted, form the basis of a successful appeal. Moreover, the Court rarely sets out the reasoning behind its decisions about fresh evidence so that it is hard to discern in any detail what the Court's approach is to this category of appeal' (Malleeson, 1993, p. 11).

It would appear therefore that there does not appear to have been a major change as a result of the change of law in the CAA 1995. But there do appear to have been some changes, both positive and negative, which are possibly attributed to the CAA 1995. The Court's approach still appears to be driven by its deference to the jury verdict and its

reverence for the principle of finality but the Court's review function and decision making process can also contribute to a restrictive approach.

If the reviewing of the conviction merely requires the Court to decide if there was evidence the jury could have convicted on then fresh evidence appeals are at odds with this function. If new evidence was freely admitted on appeal then this would be straying into retrial territory which, as the Donovan Committee stated, was 'a function which Parliament did not intend it to discharge, and for which it is in any event inadequately equipped.' This prevents the Court looking into the merits of the case as it focuses on whether the jury *could* have convicted and not whether the jury *should* have convicted. This is most apparent in fresh evidence cases because the appellant is arguing he/she did not commit the crime so an unsafe fresh evidence conviction is one more likely to be assumed to be factual innocence if overturned. And these are the cases deemed 'exceptional' by Naughton as discussed in chapter one that 'miscarriage of justice discourse' is focused on and more likely to bring reforms. A more interventionist approach may be required with more use of the power of the Court to hear the evidence *de bene esse*. This would mean the appellant not having the restriction of section 23 when deciding whether to admit the evidence and the Court perhaps being more persuaded by oral evidence than evidence given on paper. But arguably what is required is a more fundamental reform and this will be discussed in chapter nine.

In chapter six, the appeals where there is no fresh evidence and no procedural irregularity will be analysed. These are generally known as the 'lurking doubt' ground of appeal.

CHAPTER SIX: APPEALS BASED ON THE CORRECTNESS OF THE JURY VERDICT: 'LURKING DOUBT'

Similarly to fresh evidence appeals, 'lurking doubt' appeals are also based on errors of fact. For these appeals, the argument essentially is that the jury made a mistake and the appellant was wrongly convicted as he/she did not commit the crime. These appeals are particularly difficult for the Court because there is no new evidence and no procedural irregularity so the Court is essentially reviewing the evidence given at trial and deciding whether the conviction is unsafe. As discussed in chapter three, these appeals have tended to cause difficulty because of the Court's deference to the jury verdict and its reluctance to admit that the jury made an error and convicted the wrong person. These appeals also cause difficulty because the decision making process of the Court is not necessarily conducive to determining these appeals. This chapter will analyse the lurking doubt grounds from the 1990 and 2002 samples, and will also outline the common law tests that the Court has developed to determine these appeals. There will then be an analysis of the decision making process set out in the judgments to ascertain the approach the Court takes. This will be necessary to determine whether a restrictive approach is taken to these appeals and if so, where the problem lies. There will also be an analysis of the law after 2002 to see whether there have been any more recent developments which shed light on the Court's approach.

The historical approach to lurking doubt appeals will now be discussed in order to put the 2002 cases in context.

The historical approach to lurking doubt appeals

Before the CAA 1966, the Court could quash the conviction where the verdict of the jury was unreasonable or could not be supported by the evidence.²³⁵ In deciding this, the Court formulated the objective test of whether there was evidence before the Court on which a reasonably-minded jury could have convicted.²³⁶ The fact that the judges themselves were doubtful about the verdict was not of itself thought sufficient to justify quashing it. Lord Goddard, the then Lord Chief Justice, summed up the pre-1966 position in *R v Hopkins-Husson*:²³⁷

'.....It has been held from an equally early period in the history of this court that the fact that some members or all the members of this court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no

²³⁵ Section 4(1) CAA 1907.

²³⁶ *R v Pattinson and Laws* 58 Cr. App. R. 425.

²³⁷ 34 Cr. App. R. 47.

misdirection, and it cannot be said that the verdict is one which a reasonable jury could not have arrived at, this court will not set aside the verdict of guilty which has been found by the jury.²³⁸

The Court's reluctance to substitute its own subjective opinion for the jury's verdict was criticised by JUSTICE in their 1964 report on criminal appeals (JUSTICE, 1964, p. 22). The JUSTICE Committee identified the Court's approach as the problem but the Donovan Committee, which was set up by the Government in 1965 to evaluate the working practices of the Court, believed that the problem lay more with the wording of the statute. The Committee stated (Donovan Committee, 1965, para. 141): 'If there be some defect in the situation which requires to be remedied, the defect lies in the statutory language rather than in its judicial interpretation.' In order to rectify the problem, the Committee proposed that the Court should be given the express power to allow an appeal where 'upon consideration of the whole of the evidence, it comes to the conclusion that the verdict is "unsafe and unsatisfactory" '(para. 149) which was enacted in the CAA 1966. This test had been proposed during the debates on the CAA 1907 but had been defeated as the words proposed were 'too loose and obscure.' The Committee felt that in spite of the rejection of the words 'unsafe and unsatisfactory' the Court sometimes acted as though this was the proper test to apply to a jury's verdict and had quashed a verdict, which it considered to be unsafe and unsatisfactory, in spite of there being some evidence to support it (para. 147).²³⁹

This view was confirmed by the Lord Chief Justice, Lord Parker during the debates on the 1966 Criminal Appeal Bill. He stated that on many occasions he had used the words 'in all the circumstances of the case, the Court has come to the conclusion that it is unsafe for the verdict to stand.' He went on to say that:

'This is something which we have done and which we continue to do, although it may be we have no lawful authority to do it. To say that we have not done it, and we ought to have power to do it is quite wrong. It is done every day and this is giving legislative sanction to our action.'²⁴⁰

So the confusing and contradictory picture that emerged was that the majority of judges seemed to be applying the objective test of whether there was evidence before the Court on which a reasonably-minded jury could have convicted. But according to the debates on the 1966 Bill, a number of judges were also applying the subjective test of whether they themselves thought the conviction was unsafe and unsatisfactory.

²³⁸ See also *R v Chalk* which followed *R v Hopkins-Husson* where the trial judge granted a certificate that the verdict of the jury was unreasonable. The Court dismissed the appeal holding that the Court would never substitute its own opinion for that of the jury. [1961] Crim L.R. 326.

²³⁹ Citing *R v Wallace* 23 Cr. App. R. 32.

²⁴⁰ *H.L. Debs*, 12 May 1966, col. 837. Concurring opinions were given by Lord Morris (col. 843), Lord Pearson (col. 824) and Lord Stowhill (*H.L. Debs*, 21 June 1966, col. 247).

As stated by JUSTICE (1989, p. 50), in enacting the 'unsafe and unsatisfactory' ground it would appear that Parliament intended in 1966 to impose on the whole Court a duty to form its own subjective opinion about the correctness of a conviction, notwithstanding the fact that no criticism could be made of the conduct of the trial. It would appear that this had the desired effect as Knight reviewed every judgment of the Court from 1st October 1966 to 31st January 1968 and concluded that there were cases where the language of the Court displayed a wider and more sensitive preparedness to interfere with the jury's verdict, where probably pre-1966 they would not have interfered (1970, p. 135).

The leading case is *R v Cooper*²⁴¹ where the Court considered the scope of the new 'unsafe and unsatisfactory' power. Lord Widgery stated:

'.....it is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 it was almost unheard of for this Court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe and unsatisfactory. That means that in cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.'²⁴²

The effect of this judgment was that the test the Court applied was no longer an objective one as the Court now had to apply the subjective test of 'did the Court itself feel a doubt' and if it did, the jury's verdict should be set aside.

The House of Lords discussed the *Cooper* case in *Stafford v DPP*.²⁴³ Viscount Dilhorne referred to Lord Widgery's speech as 'the effect of section 2(1)(a)' though he declined to say what the correct approach should be, as he felt the Court should be given a free

²⁴¹ (1969) 53 Cr. App. R. 82.

²⁴² See also *R v Lake* (1977) 64 Cr. App. R. 172 where Lord Widgery espoused his 'lurking doubt' test again: 'Once you have decided that the rules of procedure were followed and there remains the only residual question of whether there is a lurking doubt in the mind of the Court, such doubts are resolved not, as I say by rules of thumb, and not arithmetic, but they are largely by the experience of the judge concerned and the feel which the case has for them.'

²⁴³ *Stafford v DPP* [1974] AC 878.

hand in determining what was 'unsafe and unsatisfactory' as the Act gave the Court a choice about the appropriate test.²⁴⁴

Lord Devlin commented on the dangers of the Court adopting a wide interpretation of the formula 'unsafe and unsatisfactory.' He argued that although the words could be put to good use, they were also 'insidious' and must be 'kept under control.' To do this, he argued, judges had to remind themselves that the words were not intended to transfer to the judge the power and function of the jury. The satisfaction of the judge was not a substitute for the satisfaction of the jury but a requirement added to it (Devlin, 1979, p. 200). Devlin feared that the CAA 1966 had increased the power and significance of the judges and undermined the role of the jury to the point where 'people may begin to ask themselves whether there is any longer a need for a criminal jury' (p. 115).

Lord Devlin need not have worried. As discussed in chapter three, the general consensus has been that the reluctance of the judges to usurp the role of the jury has inhibited their use of the 'lurking doubt' ground of appeal. In their 1989 report on miscarriages of justice, JUSTICE stated that in its experience of assisting with appeals against conviction, the lurking doubt power had made very little difference to the way in which the Court decided appeals. In giving evidence to the Committee, the then Registrar of the Criminal Division of the Court of Appeal, Master Thompson, said that the 'lurking doubt' principle was not implicit in the term 'unsafe and unsatisfactory' and that the Court had to have regard to the language of the statute, which did not speak of a 'lurking doubt.' He said that some of the senior judges did not regard Lord Widgery's interpretation as authoritative (Justice, 1989, para. 4.16). JUSTICE was only able to find six reported cases since *Cooper* when the Court had quashed the conviction on the grounds that there was a lurking doubt because the conviction was against the weight of the evidence, and where nothing had arisen since the trial.²⁴⁵

In later cases the concept of a 'lurking doubt' remained but the wording changed. For example, in *R v Wellington*²⁴⁶ Lord Lane CJ explained:

'We have to consider the matter as it has been presented to us and to decide whether, in the light of the further arguments which we have heard, the verdict is safe and satisfactory or whether we feel a reasoned or substantial unease about the finding of guilt.'

Although in other cases, the judges have preferred to adopt the language of the statute. In *R v Maguire*,²⁴⁷ Stuart-Smith LJ stated 'we have ourselves not found it helpful to seek

²⁴⁴ [1973] 3 All ER 722, 764.

²⁴⁵ *R v Pattinson and Laws* 58 Cr. App. R. 417; *R v Thorne and Others* 66 Cr. App. R. 6; *R v Lamb* 71 Cr. App. R. 198; *R v Thompson* 74 Cr. App. R. 315; *R v Pope* 85 Cr. App. R. 201; *R v O'Leary* (1988) Crim L.R. 827.

²⁴⁶ (1991) Crim L.R. 543.

an answer to the question of whether we think the verdicts were unsafe or unsatisfactory by posing some other question.'

The lurking doubt ground was discussed by the Royal Commission on Criminal Justice

The Royal Commission on Criminal Justice

The RCCJ discussed that they 'fully appreciate the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict' as 'the jury has seen all the witnesses and heard their evidence; the Court of Appeal has not.' But their conclusion was that:

'Where, however, on reading the transcript and hearing argument the Court of Appeal has a serious doubt about the verdict, it should exercise its power to quash. We do not think that quashing the jury's verdict where the court believes it to be unsafe undermines the system of jury trial. We therefore recommend that, as part of the drafting of section 2, it be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having regard to all the relevant evidence and without any error of law or material irregularity having occurred' (RCCJ, 1993, p. 171).

The RCCJ clearly wanted the Court to take a more liberal approach to these appeals and as discussed in chapter one, the test proposed by the RCCJ was whether a conviction 'is or may be unsafe.' This was rejected by the Government who preferred a simpler 'is unsafe' test. In a consultation paper issued after the RCCJ report the Government stated that it accepted that 'it is right that the Court's freedom to act on a "lurking doubt" should be preserved' (Home Office, 1994, para. 12) and in its response to the RCCJ, the Government stated that the concept of lurking doubt was incorporated into the unsafe ground. But the debates on the 1995 Criminal Appeal Bill showed there was concern that although the 'is or may be unsafe' test would have broadened the Court's approach to the lurking doubt ground, the 'is unsafe' ground would restrict it. As discussed in chapter one, it had been suggested that prior to the enactment of the 1995 CAA, the Court was acting under the *Cooper* standard and adopting a more liberal approach. The aim in changing the law, therefore, was to encapsulate this supposed more liberal approach. In light of this, research was required in order to determine the status of the 'lurking doubt' ground after the enactment of the CAA 1995 to see whether it had been incorporated into 'unsafe' and also to see whether the Court was taking a more liberal or restrictive approach to this ground of appeal.

The first interpretation of the new safety test was in *R v Graham*.²⁴⁸ The Lord Chief Justice, Lord Bingham appeared to suggest that the lurking doubt ground had been incorporated into the new test. He stated:

²⁴⁷ [1992] 2 All ER 433.

²⁴⁸ (1997) 1 Cr. App. R. 302.

'This new provision is plainly intended to concentrate attention on one question: whether, in the light of any arguments raised or evidence adduced on appeal, the Court of Appeal considers a conviction unsafe. If the court is satisfied, despite any misdirection of law, or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged, *or is left in doubt* whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe. The court is then subject to a binding duty to allow the appeal.'²⁴⁹

This speech was cited with approval by Rose LJ in *R v Dures*,²⁵⁰ who agreed with counsel's argument that 'even when a trial has been conducted properly without any misdirection of law and no new significant evidence has subsequently come to light, this Court may still conclude that a verdict is unsafe.' However, two years later in *R v F*,²⁵¹ the Court appeared to suggest that lurking doubt was no longer a valid ground of appeal. Roch LJ stated:

'The phrase 'lurking doubt' is not now, in our opinion, a proper approach. Parliament in section 2(1) of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995, has laid down a simple test. In our view it is undesirable to place a gloss on the test formulated by Parliament which has the advantage of brevity and simplicity. The approach of this Court to the question which this Court has to decide on an appeal against conviction in any particular case should not be allowed to become an accretion to the simple and clear test set out in the statute which counsel may urge this Court to follow in future cases.'

But it was not clear whether Roch LJ was saying that the phrase 'lurking doubt' was no longer valid or whether the concept of lurking doubt was not incorporated into the new unsafety test. If he was saying the latter then this directly contradicted the views of the Government in enacting the test and the view of the Lord Chief Justice, Lord Bingham, as discussed above. Lord Bingham reiterated his view in *R v Criminal Cases Review Commission ex p Pearson*,²⁵² which was decided after *F*, thereby reinforcing that lurking doubt had been incorporated into the 'unsafety' test. So it would appear that, despite the judgment in *F*, the lurking doubt ground has been incorporated into the unsafety test. Therefore, empirical research was needed in this area to determine whether the amendments to the fresh evidence provisions have brought about any changes to the Court's approach to these appeals. As the above shows, the Court's approach to these appeals has largely been described as restrictive. But just as with fresh evidence appeals, without a normative baseline in which to measure the Court's approach it can be difficult to determine whether the Court is taking a restrictive approach as it is difficult to ascertain whether more convictions should be quashed. With that in mind, the

²⁴⁹ *Ibid*, 308.

²⁵⁰ (1997) 2 Cr. App. R. 247, 259.

²⁵¹ (1999) Crim L.R. 306.

²⁵² [1999] 3 All ER 247, 258-259.

judgments in this chapter will be analysed in terms of whether it is possible to say whether the Court is being restrictive or liberal and if so, whether that approach can be attributed to the changes in the 1995 Act.

The 1990 and 2002 sample of judgments

Malleson's research for the RCCJ (Malleson, 1993) revealed that the possibility of a 'lurking doubt' was referred to directly in eight out of 300 appeals. She found that in two of those the Court held there was no lurking doubt:

'There is no feature in our judgment in this case which gives rise to any lurking doubt in our minds as to whether an injustice has been done.' Jenkins 9/4

'.....it does not give rise to any lurking doubt.' Horridge 9/2

Malleson found that in a further two cases the phrase 'lurking doubt' was not referred to directly, but the Court appeared to have the principle in mind:

'We have no uneasy feeling about the result.' Wyatt 16/1

'There are no features which cause us disquiet.' Gottesman 22/1

Malleson also found that in six cases the Court held that there was a 'lurking doubt' sufficient to render the conviction unsafe and unsatisfactory (citing four of them):

'The anxiety we feel about this case is such as to indicate to us that there is a lurking doubt that the verdict was unsafe and unsatisfactory.' Dudley 16/2

'It leaves us with a lurking doubt as to the safety of the conviction.' Ettiene 8/2

'Looking at the whole matter, we believe this case is one which at the end of the day there is a lurking doubt.' King 15/2

'There may be a lurking doubt.' Payne 14/6

There was one case in the 1990 sample that directly referred to the *Cooper* case:

'In the end we must look at the case as a whole and ask ourselves, in the words of Widgery L.J. in *Cooper*, whether we are left with a lurking doubt.' Wallace 27/7

Malleson states (p. 12) that in the few cases where the principle was raised, the Court adopted a surprisingly unrestrained approach to the problem of deciding whether they were, at the end of the day, happy to let the judgment rest and, in one case, acknowledged the essentially subjective question which lurking doubt cases raised. She cited the following:

'Lurking doubt cases always demand of the Court, as has been said, an exercise in pure judgment.' Knight 5/7

Malleson found (p. 12) that in lurking doubt cases the grounds relied upon tended to be very general, such as: the identification evidence was weak; that the judge should have ruled that there was no case to answer after the prosecution evidence had been adduced, or that the verdict was unsafe and unsatisfactory overall. Only one lurking doubt case involved fresh evidence, suggesting that the Court usually reserved the lurking doubt principle for cases that share the same features as the *Cooper* case where the appeal was founded on the claim that the jury's direction was wrong despite the absence of any new material or failing on the part of the judge. Her conclusions were:

'The fact that the principle was directly or indirectly raised in only 10 of the 281 appeals which were finally decided suggests that lurking doubt cases constitute a relatively small proportion of appeals, although interestingly the number of such cases was substantially higher than those identified in similar research carried out for Justice in 1989. The Court appears to regard the principle as a last resort for those cases where no criticism can be made of the trial, yet concern about the justice of the conviction still lingers. Its reluctance to interfere with the jury's verdict undoubtedly inhibits the Court from expanding this category of appeal' (Malleson, 1993, p.12).

The 2002 sample of judgments revealed that the principle of lurking doubt was referred to directly or indirectly in seven of the 300 appeals, with one allowed and six dismissed or refused. In the one appeal allowed, lurking doubt was not actually raised as a ground of appeal but the concept of lurking doubt was referred to by the judges when quashing the conviction:

'At the end of our reading, all three members of this Court have an uneasy feeling about the safety of these convictions and that unease must register in allowing this appeal against conviction.'²⁵³

Lurking doubt was directly referred to in five of the six appeals dismissed or refused with one appeal referring directly to the *Cooper* case:

²⁵³ *R v Marsh* [2002] EWCA Crim 1497.

'The third point raised is that this Court should have a lurking doubt about the safety of the convictionWe have come to the conclusion that there are no doubts about the safety of the conviction.'²⁵⁴

'In those circumstances we conclude....that we feel neither a lurking doubt nor reason for substantial unease about these findings of guilt.'²⁵⁵

'There is no possibility, in our judgment, of applying the lurking doubt exception. We are satisfied that the verdicts are not even arguably unsafe.'²⁵⁶

'We do not feel a lurking doubt about the verdicts.'²⁵⁷

'The final matter which we have considered is Mr Evans' submission that, when all the evidence is added up....should lead us, that is to say this Court, to what can be summarised as a lurking doubt in the Cooper sense. We are not left with such a doubt.'²⁵⁸

The sixth appeal merely argued that 'the convictions are unsafe' which was listed as a separate ground of appeal, amongst others, but was not referred to by the judges when refusing the application as it was a renewed application to appeal.²⁵⁹

This research confirms that, despite the ruling in *R v F*, the concept of lurking doubt has been incorporated into the safety test and is still a valid ground of appeal. The samples show very similar numbers in terms of lurking doubt grounds argued with ten out of 300 appeals in the 1990 sample and seven out of 300 appeals in the 2002 sample. This may indicate that changing the test to 'unsafe' has not had an impact on this ground of appeal. However, the 1990 sample shows that in six out of the ten appeals that raised the principle of a lurking doubt, the conviction was quashed whereas only one out of seven appeals was quashed in the 2002 sample. This may suggest that whilst the safety test did not have any impact in terms of numbers of appeals arguing lurking doubt grounds, the judges are now taking a much more restrictive approach in terms of when it will result in the conviction being quashed.

In two of the cases in the 2002 sample, the lurking doubt ground was the only ground of appeal, *R v McGuirk* and *R v Baig*. In *R v McGuirk*, the Court reviewed the evidence that the witnesses gave and the Court highlighted the difficulties that lurking doubt cases cause. The Court upheld the conviction and Kay LJ stated:

²⁵⁴ *R v Morris* [2002] EWCA Crim 158.

²⁵⁵ *R v McGuirk* [2002] EWCA Crim 861.

²⁵⁶ *R v Baig* [2002] EWCA Crim 823.

²⁵⁷ *R v Martin* [2002] EWCA Crim 1214.

²⁵⁸ *R v Graham* [2002] EWCA Crim 1296.

²⁵⁹ *R v Brownlie/Heemskerk* [2002] EWCA Crim 921.

'It seems to this court that this court is in no position, having heard none of the witnesses, to in any way conclude that the jury could not reach the verdicts that they did.'²⁶⁰

This case confirms that if there is no procedural irregularity and no fresh evidence, then the appeal court is reluctant to interfere. Malleeson's view was that the Court's deference to the jury verdict clearly has an impact on this ground of appeal. The 2002 sample appears to confirm this. The Court's deference is based on two factors. The Court does not see or hear the trial witnesses, it reviews the case on paper. Therefore, it takes the view that the jury were in a much better position to view their credibility. Also, as the Court frequently states, issues of fact are for the jury to determine as the Court reviews the safety of the conviction. If the Court is being asked to reconsider the same evidence before the jury then it is not allowed to take a different view of that evidence because that contravenes the *Pendleton* principle, as discussed in chapter five, and its review function. Cases such as *R v McGuirk* show that even if the Court takes the view that the evidence of the witnesses was flawed it will generally not interfere because of the Court's deference to the jury. This may result in injustice if the appellant is obviously wrongly convicted. Once again, it appears that the Court is deciding on the basis of whether the jury *could* convict and not whether they *should* have convicted but the lurking doubt ground was specifically created so the Court would look into whether the jury should have convicted.

In the other cases in the 2002 sample, the lurking doubt ground was one of a number of grounds which included a no case to answer submission not agreed to (*R v Brownlie* and *R v Morris*); similar fact evidence should not have been admitted (*R v Martin*); poor identification evidence (*R v Graham*); biased summing up (*Marsh*) and misdirection on the law (*R v Morris*). Similarly to Malleeson, only one of the lurking doubt cases involved fresh evidence (*R v Baig*). These appeals appear to be easier for the Court to consider because it is considering the lurking doubt ground in light of the other grounds. If the Court does want to quash the conviction it generally uses one of the other grounds to do so to avoid the problems as discussed above. But it is because of the problems discussed above that these appeals are so rare and even more rarely, successful.

The lurking doubt cases after 2002 will now be discussed.

Lurking doubt after 2002

There was a case soon after the sample where the then Lord Chief Justice, Lord Woolf, appeared to reinforce the Court's lurking doubt power. In *R v B*,²⁶¹ the appellant was convicted of indecently assaulting his step-daughter. The offences had allegedly taken

²⁶⁰ *R v McGuirk* [2002] EWCA Crim 861, para 14-16.

²⁶¹ [2003] 2 Cr. App. R. 13.

place approximately thirty years earlier. Prior to the trial an application had been made that it would be an abuse of process to try the appellant because of the length of time between the offences and the trial. The judge disagreed and the trial proceeded. On appeal, the appellant argued that the trial should have been stayed as an abuse of process. The appeal was allowed on the basis that the delay meant the appellant was not properly able to defend himself. The phrases 'lurking doubt' or 'reasoned and substantial unease' were not used in the judgment but Lord Woolf stated:

'....there remains in this court a residual discretion to set aside a conviction if we feel it is unsafe or unfair to allow it to stand. This is so even where the trial process itself cannot be faulted. It is a discretion which must be exercised in limited circumstances and with caution. When we exercise that discretion we must be conscious that we are not only involved in deciding where justice lies for the appellant. We must do justice to the prosecution, whose task it is to see that the guilty are brought to justice. We must also do justice to the victim. But we also have to do justice to the appellant. At the heart of our criminal justice system is the principle that while it is important that justice is done to the prosecution and justice is done to the victim, in the final analysis the fact remains that it is even more important that an injustice is not done to a defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted.'²⁶²

This appears to reinforce the principle of lurking doubt that the Court has the power to quash convictions where there is no procedural irregularity and no fresh evidence but the Court feels that the appellant was wrongly convicted. Lord Woolf makes it plain that these appeals are about the Court remedying injustice and one interpretation of this is that the Court is entitled to come to a different view from the jury, when it is in the interests of justice to do so. But the Court's review function means it is deciding whether the jury could convict on the evidence not looking at the wider implications of whether this person was wrongly convicted. This task is made all the more difficult because the Court is reviewing the case on paper which may not easily give rise to a lurking doubt.

The difficulty of the Court's task when deciding on lurking doubt appeals was discussed by Leigh who examined a number of recent judgments where the ground of appeal had been argued including *R v B*. The 2002 sample shows that the judges in the Court of Appeal are using both the 'lurking doubt' test and the 'reasoned or substantial unease' test and there is confusion as to whether there is any real difference between these two phrases. In *R v Benton and Joseph*,²⁶³ Henry LJ appeared to suggest that the 'lurking doubt' test was a more subjective test than the 'reasoned or substantial unease' test. He did not elaborate on this but stated that 'this Court is satisfied that both of these formulae, either of which we are happy with, lead to the same test at the end, was the

²⁶² *Ibid*, para. 27.

²⁶³ Courts-Martial Appeal Court, unreported, transcript 23 February 2000, case number 9903948/4073 S2, paras 28-29.

conviction unsafe?' Leigh also suggests that there may be differences between these two phrases. He states:

"'Lurking doubt'....encapsulates a conclusion which may be the result of a reasoned analysis of the evidence, but which may equally amount to an instinctual approach to the case on the basis of a premise which may remain concealed from or inarticulate on the part of the judges concerned. The former approach, that of reasoned analysis, fully respects the jury's role as decider of fact; the latter may not unless the court's instinctual reaction to the case as a whole is ultimately defensible in analytical terms' (Leigh, 2006, p. 811).

Leigh's argument is essentially that a 'lurking doubt' must be founded on a combination of 'evidence and circumstance' which leads the court to the conclusion that there is a doubt about the safety of the conviction. He argues that where there was no apparent flaw, setting aside a verdict upon which a jury could properly arrive, strikes at the constitutional division between judge and jury and would contravene the *Pendleton* principle. He reviewed a number of cases where the lurking doubt ground was argued and his conclusions were that:

'In my submission, the Court of Appeal has not, even in the most expansive modern cases, sought to substitute its view of the facts for that of a fully and properly-instructed jury in determining whether a conviction is unsafe. Were it to do so, the Court would fall foul of *Pendleton*. Nor, is it necessarily the case that *Cooper* need be regarded in that light. The general impression which the court has of a case need not be restricted to the question whether the jury's verdict or verdicts was or were defensible on the evidence. It can relate to other matters such as whether the defendant had the opportunity to defend himself, or whether the prosecution evidence at its highest is capable of sustaining the charge, or whether, acknowledging that the evidence is such upon which a jury can convict, the case, for whatever reason, can safely be left to the jury. *Cooper* need not be so construed as to permit a purely visceral reaction to the case as a whole nor, it would seem, is it being applied in that way' (Leigh, 2006, p. 815).

Leigh discussed *R v B* above. In his view 'while the decision is placed on the ground of the residual discretion, it would appear that the true reason was that the appellant, because of the delay, was put in an impossible position to defend himself' (Leigh, 2006, p. 811). Therefore, Leigh argues that *R v B* was not decided on the basis of a 'lurking doubt' but rather on the basis that there was a procedural irregularity in that the case should have been stayed because the appellant was not able to get a fair trial. As both the 1990 and 2002 samples show, the lurking doubt ground is usually argued with other grounds of appeal so it is extremely rare for it to be argued on its own. Therefore, the decision making process usually considers the lurking doubt ground along with those other grounds of appeal, making it very difficult to ascertain what approach is being taken to the lurking doubt ground itself. In *R v B*, the ground of appeal was that the trial should have been stayed (with no mention of a lurking doubt) and because of this it could be argued that the Court is merely agreeing with the ground of appeal argued in

the case. But the fact that Lord Woolf suggests that the Court does have a residual discretion to set aside a conviction on the basis that it is 'more important that the innocent are not wrongly convicted' and dismisses the ground that the trial should have been stayed, does suggest that the decision was made on the basis of the Court feeling an injustice had been done rather than a procedural irregularity had occurred.

There have been other cases after the 2002 sample that discussed Lord Woolf's approach in *R v B*. In *R v G*,²⁶⁴ the appellant was convicted of rape and indecent assault. This case was referred by the CCRC. The grounds relied on were: the prosecution should have been stayed as an abuse of process because of the delay between offence and trial; the directions as to delay were insufficient; and there was a lurking doubt. Clarke LJ referred to the case of *R v B* and stated:

'In the case of B, although the court did not fault the trial process or indeed the summing up in any way, this court allowed the appeal and did so on the basis that it was one of those residual cases in which the court should set aside the conviction, as Lord Woolf put it.... "in the interests of justice".....it is an example of what used to be called a "lurking doubt."'²⁶⁵

This would suggest that *R v B* was not decided on a procedural irregularity but a lurking doubt about the conviction generally. In *R v G*, the appeal was dismissed as the Court decided that the appellant had been able to challenge the complainant's credibility and was able to mount a defence, despite the delay. In *R v W*,²⁶⁶ the appellant was convicted of indecent assault and buggery. The grounds were similar to the above cases. They were that the judge should have stayed the proceedings on the basis of an abuse of process because of delay; the judge erred in rejecting a 'no case to answer' submission; the judge misdirected the jury and 'the case falls into the category of residual cases where it is in the interests of justice to set the conviction aside.'²⁶⁷ Clarke LJ stated 'this court has always recognised that it has the power and indeed the duty to quash a conviction if it has, as it used to be put, a lurking doubt as to the safety of the conviction.'²⁶⁸ However, the Court dismissed the appeal with Clarke LJ stating 'given our conclusion that there was no failing in the trial process, we have reached the conclusion that there is no proper basis on the facts of this case upon which we could hold that these convictions are unsafe.'²⁶⁹

In *R v Gamble*,²⁷⁰ the appellant was convicted of rape. The sole ground of appeal was lurking doubt. The Court again referred to Lord Woolf's speech in *R v B* with Pill LJ

²⁶⁴ [2005] EWCA Crim 1792.

²⁶⁵ *Ibid*, para. 71.

²⁶⁶ [2004] EWCA Crim 2901.

²⁶⁷ *Ibid*, para. 14.

²⁶⁸ *Ibid*, para. 19.

²⁶⁹ *Ibid*, para. 41.

²⁷⁰ [2004] EWCA Crim 3335.

stating 'the Court's power and duty to exercise, in an appropriate case, a residual discretion to set aside a conviction it feels to be unsafe has been reaffirmed in *R v B*.²⁷¹ But he went on to say that 'the trial process depends on our confidence in the jury system, as the Lord Chief Justice [Lord Woolf] has recently made clear. We rely on the collective experience and knowledge of life of jurors. We rely on the jury's assessment of evidence, along with their knowledge of behaviour and events such as those, and including those, which form the background to the issue before the jury in this case.'²⁷² The Court dismissed the appeal and Pill LJ stated 'having considered the evidence, and heard the submissions of counsel, we have confidence that the jury who carefully and conscientiously considered the evidence, which was their duty and task, reached a correct verdict.'²⁷³ In *R v Bailey*,²⁷⁴ the appellant was charged with supplying Class A drugs. The appellant argued that a no case to answer submission should have been acceded to and there was a lurking doubt. In relation to the lurking doubt, Kay LJ stated 'it is plainly the case that this court retains a discretion to hold a conviction to be unsafe in such circumstances, notwithstanding the change in the statutory test for allowing appeals against conviction.'²⁷⁵ He referred to Lord Woolf's speech in *R v B*, and stated 'in our judgment, it would be wholly exceptional, and in the circumstances of this case quite wrong, for us to go behind the verdicts of the jury. In a short and uncomplicated case, they were able to assess the witnesses, including the appellant, and to apply the careful and forthright directions of the judge. It is not for this court to form a different view of the evidence.'²⁷⁶ He went on to say that:

'We have considered the authorities referred to in the current edition of *Archbold* at paras 7-47 to 7-48. The case of *Cooper* 53 Cr App R 82 was one in which there was an issue about identification with obvious causes for concern. *Pattinson and Laws* 58 Cr App R 417 was a case where the lurking doubt related to the unreliability of a confession and of a particular witness. In the judgment in that case there is a reference to other cases of lurking doubt which had features such as complications arising out of the acquittal of co-defendants upon the same evidence. These authorities, exceptional in themselves, are in a wholly different territory from the present case. We are satisfied that the convictions were safe and we accordingly dismiss this appeal.'²⁷⁷

This would seem to suggest that Kay LJ was saying the lurking doubt should derive from the other arguments in the case such as the weakness of identification evidence, the unreliability of confessions or inconsistent verdicts. This would explain why the lurking doubt ground is generally argued with other grounds of appeal. But Kay LJ highlights the

²⁷¹ *Ibid*, para. 24.

²⁷² *Ibid*, para. 26.

²⁷³ *Ibid*, para. 28.

²⁷⁴ [2004] EWCA Crim 2169.

²⁷⁵ *Ibid*, para. 16.

²⁷⁶ *Ibid*, para. 20.

²⁷⁷ *Ibid*, para. 22.

problem of the Court's review function which does not allow it to form a different view of the evidence so in that he is correct.

Despite Lord Woolf's reinforcement of the lurking doubt principle, it would appear that the 'residual discretion' test has not proved to be an authoritative alternative for 'lurking doubt' appeals. This may be explained by the case dealing with the issue of abuse of process in relation to delay between the offences and the trial. It may also be explained by the confusion as to the basis of the decision. For example, in *R v E*,²⁷⁸ the appellant was convicted of buggery and he argued he was unable to mount an appropriate defence because of the lapse of time. The Court considered *R v B* and Hooper LJ held:

'We have two comments to make about B. We see a degree of tension between para.19 and paras 27–29. It is questionable that the judge was right to conclude at the close of the evidence that it would not have been unsafe for the jury to convict the defendant if it had been impossible for the defendant to defend himself. Secondly, although the Court spoke of a "residual discretion", we remind ourselves that if the Court concludes that the conviction is unsafe, it must be set aside. We approach this appeal in that way.'²⁷⁹

In this case the appeal was upheld because the defendant was able to mount a defence. It would appear that, if there is a lasting legacy to Lord Woolf's residual discretion test, it is in relation to abuse of process and delay rather than lurking doubt arguments.²⁸⁰ There have been cases more recently that have considered the residual discretion test without arguments in relation to abuse of process and delay but these are very rare. For example, in *R v Roberts*,²⁸¹ the ground of appeal was that the judge had misdirected on diminished responsibility and the Court should substitute a manslaughter conviction for murder on the basis that the conviction was 'unsafe or unfair' using Lord Woolf's terminology. The Court was essentially being asked to review the evidence of the psychiatrists at trial and substitute its own verdict for that of the jury. Gage LJ stated:

'we accept that this court has a residual discretion to quash a conviction where it feels that the conviction was unsafe or unfair to allow it to stand. Lord Woolf said so in *R v B* [2003] 2 Cr App Rep 13, see p 204. But Lord Woolf added:

"It is a discretion which must be exercised in limited circumstances and with caution."

In the final analysis, it was for the jury to decide whether on a balance of probabilities the defence of diminished responsibility had been made out.'²⁸²

²⁷⁸ [2004] 2 Cr. App. R. 36.

²⁷⁹ *Ibid*, para. 15.

²⁸⁰ See for example, *R v Smolinski* [2004] EWCA Crim 1270; *R v A* [2005] All ER (D) 212; *R v L* [2005] All ER (D) 394; *R v S* [2006] All ER (D) 73; *R v Coghlan* [2006] All ER (D) 190; *R v J* [2006] All ER (D) 321; *R v D* [2007] All ER (D) 329.

²⁸¹ [2005] EWCA Crim 199.

²⁸² *Ibid*, para. 28.

It would appear that in this case the Court is being asked to review all the evidence at trial and come to a different decision than the jury. The Court appears to accept it can do this but chooses not to in this case as these were matters for the jury to consider. But it does at least show that Lord Woolf's residual discretion test is an alternative to the 'lurking doubt' or 'reasoned and substantial unease' test even if it is not used very often. This does at least appear to reinforce 'lurking doubt' type arguments even if it adds to the confusion as to how these cases are decided by the Court.

Whilst it may be debatable as to the reasoning in *R v B* - whether the Court did second guess the jury and come to its own conclusions on the evidence, and cases such as *R v Roberts* show the Court is reluctant to do this - there are certainly cases after the 2002 sample which seems to suggest the Court did do this. In *R v Taghibeglou*,²⁸³ the appellant was convicted of indecent assault. The prosecution case was that the appellant posed as a minicab driver and picked up two women. He dropped the first woman off and then drove to a quiet road where he got in the back seat and allegedly indecently assaulted the second woman. The following day, the appellant had rung the woman's mobile telephone and spoken to her mother. The appellant was then arrested and picked out at an identification parade. The prosecution alleged that in order to get the mobile telephone number of the victim, the appellant would have had to get hold of the victim's phone and call his own mobile telephone to log the number of the victim. The prosecution case was that he must have done this whilst carrying out the indecent assault. The defence case was that the appellant had met the woman earlier in the evening and had swapped numbers with the woman. He had a different car than the one described and there was no record of his number being dialled from the victim's telephone. The phone records for the victim's phone and the appellant's phone were not checked during the six month period in which they are kept. The grounds for appeal were that the judge should have acceded to a no case to answer submission, the judge's summing up was inadequate and there was a lurking doubt. The Court rejected the judge's summing up ground but did express concern about the safety of the conviction as it clearly had doubts about the prosecution case. The Court expressed concern about the inadequacy of the investigation with the phone records not checked, no CCTV evidence, and a lack of evidence relating to the cab office and whether the appellant was a taxi driver. The appeal was allowed with Richards LJ stating that the prosecution case 'offended common sense'.²⁸⁴

The Court in this case seemed to form its own view of the prosecution evidence as it discussed in detail the elements of it that troubled it. However, because of the rejection of the no case to answer submission, the Court was able to use that as the reason for

²⁸³ [2005] EWCA Crim 3453.

²⁸⁴ *Ibid*, para. 25.

quashing the conviction and did not have to decide the case solely on the lurking doubt which it appears it had. Similarly, in *R v Malkin*,²⁸⁵ the appellant was convicted of indecent assault. The Court allowed the appeal on the basis that because the two prosecution witnesses contradicted each other the judge should have agreed to the no case to answer submission. The lurking doubt ground was dismissed. Again, in *R v Hodnitt*,²⁸⁶ the appellant was convicted of careless driving of a motorbike on the basis he was over the blood alcohol limit at the time of an accident. The ground of appeal was that a no case to answer submission should have been acceded to. The Court reviewed the evidence and allowed the appeal. Mantell LJ stated:

‘They [the prosecution] are unable to remove from consideration the real possibility that drink had been taken in the hour before the accident, or the real possibility that some other agency may have been involved in the accident which need not necessarily have come about through the appellant’s careless driving. This may be one of those rare cases where the court is left with a lurking doubt. Whether for that reason or for others which we have expressed, we do not consider this conviction to be safe. Accordingly, it will be quashed and the appeal allowed.’²⁸⁷

This appears to suggest that the Court was not satisfied that the prosecution had proved the elements of the offence. Whilst it could be argued that the Court was merely stating that the jury was not entitled to convict on the evidence, it could also be argued that the Court is making its own evaluation of the evidence, contravening the *Pendleton* principle.

The Court also allowed the appeal in *R v Green*.²⁸⁸ The appellant and a co-accused were charged jointly with murder and the appellant was also charged with robbery and theft. The appellant was convicted of murder and the co-accused was convicted of manslaughter. On appeal, it was argued that the verdicts were inexplicable and counsel for the appellant also raised the possibility of a lurking doubt. The Court reviewed the evidence and Kennedy LJ stated ‘in the circumstances, we are satisfied that, while not at least in theory to be regarded as logically inconsistent, the verdicts were ones which no reasonable jury who had applied their minds properly to the facts of the case could reach.’²⁸⁹ The Court substituted a manslaughter conviction for a murder conviction. The basis for the Court’s decision was that the prosecution had advanced a case where the co-accused had wielded the knife and stabbed the victim and not the appellant. Therefore, for the jury to decide the appellant was guilty of murder and the co-accused, guilty of manslaughter meant the appellant’s murder conviction was unsafe.

²⁸⁵ [2004] EWCA Crim 2753.

²⁸⁶ [2003] EWCA Crim 441.

²⁸⁷ *Ibid*, para 12.

²⁸⁸ [2005] EWCA Crim 2513.

²⁸⁹ *Ibid*, para. 35.

The *Green* case was discussed by Leigh. He argues that:

'In cases such as these, although the phrase 'lurking doubt' is sometimes invoked, it seems to have little functional part to play in the court's decision. Courts sometimes suggest that there may well be truly exceptional cases where the court can find no logical inconsistency and yet allow the appeal solely on the basis that a jury arrived at different verdicts either as to individual defendants jointly charged, or as to the different counts in the indictment' (Leigh, 1996, p. 814).

One such case is *R v Daniels*.²⁹⁰ The appellant and a friend, Dunne, had been recruited by another co-defendant, Pinnock, to travel to Amsterdam to bring a bicycle back. When they arrived, Pinnock informed them that the arrangements had changed and they were bringing back packages that they were told contained money. Dunne and Daniels both checked the packages and thought they contained money. They did, in fact, contain heroin. Both Pinnock and Daniels were convicted and Dunne was acquitted. The trial judge clearly had problems with the verdict and had discussed with both counsel the possibility of issuing a trial certificate for appeal. But he then declined to do so. Daniels appealed on the grounds that the verdicts were inconsistent and in the alternative that the convictions were unsafe (on the basis of a lurking doubt). The Court considered that there were differences between the cases of Dunne and Daniels that may have justified the differing verdicts, though it acknowledged that the case presented by the prosecution at trial was that there were no differences between the two defendants. Therefore, the Court was not satisfied that the verdicts were inconsistent. The Court allowed the appeal with Hallett LJ stating 'given all those circumstances, in particular the agreed basis upon which the case was presented at trial, with some considerable degree of hesitation, we have come to the conclusion that there is a doubt about the safety of the conviction.'²⁹¹ Hallett LJ also stated 'the appellant, we should add, should consider himself a very fortunate young man.'²⁹²

It would appear that this is a case where the Court disagreed with the jury and allowed the appeal on that basis. It rejected the inconsistent verdict argument and allowed the appeal agreeing with the trial judge that an 'injustice' had occurred. This case was decided after the publication of Leigh's article and was not, therefore, considered by him but it does appear to contradict his assertion that 'the Court of Appeal has not, even in the most expansive modern cases, sought to substitute its view of the facts for that of a fully and properly-instructed jury in determining whether a conviction is unsafe.' The Court clearly disagreed with the jury because it was satisfied there were differences between the two cases that could have justified them coming to different verdicts as it decided the verdicts were not inconsistent. The basis of the decision to quash the

²⁹⁰ [2008] EWCA Crim 498.

²⁹¹ *Ibid*, para. 19.

²⁹² *Id*.

conviction, therefore, seems to be because of a lurking doubt and it is difficult to see on what basis the decision was made other than the Court deciding in its opinion that the appellant should not have been convicted.

The cases that have argued a lurking doubt and have been allowed since the 2002 sample have confirmed that the ground tends to be argued with other grounds such as that no case to answer submissions should have been acceded to or the verdicts were inconsistent. If the court is deciding on one of those grounds, other than the lurking doubt ground, then it is possible to argue that the basis of the decision is a procedural irregularity. But if the Court dismisses the procedural irregularity but goes on to quash the conviction because of the lurking doubt, then it seems that the Court is making its own evaluation of the evidence and deciding if the appellant was rightly convicted. This is illustrated by the speech of Lord Rodger in the Privy Council case of *Dookran and another v The State*.²⁹³

'Although reference to lurking doubt has been criticised from time to time as an unwarranted gloss on the language of the statute regulating appeal proceedings in England and Wales, it is really just one way in which an appeal court addresses the fundamental question: is the conviction safe? In the vast majority of cases the answer to that question will be found simply by considering whether the rules of procedure and the rules of law, including the rules on the admissibility of evidence, have been applied properly. Very exceptionally, however, even where the rules have been properly applied, on the basis of the 'general feel of the case as the Court experiences it', there may remain a lurking doubt in the minds of the appellate judges which makes them wonder whether justice has been done.'²⁹⁴

He went on to say that 'as Widgery LJ indicates [in *Cooper*], any impression of this kind is something which the judges in an appeal court will tend to form for themselves on the basis of an overall view of the specific features of the particular proceedings. As such, it is unique to those proceedings and will not be replicated in other cases.'²⁹⁵ In that case the conviction was quashed of one of the appellants as the judges could not '....avoid a residual feeling of unease about whether justice has been done.'²⁹⁶

This definition of what is justice or injustice would seem to suggest that the Court has the power to quash the conviction if it feels the appellant was wrongly convicted. This is also reinforced by Lord Woolf's speech in *R v B* above. If the Court is able to evaluate the evidence for itself and quash the conviction on the basis that it feels the appellant did not commit the crime then it is difficult to see how this is not contravening the Pendleton principle. It also shows the Court is able to disagree with the jury verdict and come to a different conclusion on the evidence when it wants to, which contradicts Leigh's

²⁹³ [2007] UKPC 15.

²⁹⁴ *Ibid*, para. 15.

²⁹⁵ *Ibid*, para. 16.

²⁹⁶ *Ibid*, para 36.

assertion above that the Court has never done this. As the analysis above demonstrates, the Court clearly does not do this very often. Although cases where the conviction has been quashed illustrate that the Court has taken a more liberal approach, there are far more cases after the 2002 sample which potentially show the Court taking a restrictive approach. These will now be discussed.

There were a number of cases where the Court decided it did not have a lurking doubt about the conviction. For example, in *R v Donovan*,²⁹⁷ *R v Melville*,²⁹⁸ *R v Parry and another*,²⁹⁹ and *R v H and another*.³⁰⁰ In *R v Duncan*,³⁰¹ *R v Matthews and Alleyne*,³⁰² and *R v Mullings; R v Morgan*,³⁰³ the Court made a point of saying that this was a case pre-eminently for the jury. These cases are potentially evidence of a restrictive approach as they emphasise that the jury is the fact finder and not the Court.

The Court appeared to take a slightly different view in *R v Heron*.³⁰⁴ In this case the appellant was convicted of murder and grievous bodily harm with intent. There were a number of grounds advanced such as the judge was wrong to reject a submission of 'no case to answer', there were misdirections to the jury, there was a lurking doubt, and new evidence. The appeal was dismissed but in relation to the lurking doubt ground, Scott Baker LJ stated:

'Given that there was a case to leave to the jury and given that the appellant elected not to give evidence, it is difficult to see how the court can be persuaded that there is a lurking doubt about the safety of this conviction in the absence of a specific factor to create one.....in our judgment, if we are not persuaded for some specific reason that the conviction is unsafe, the appellant does not succeed on lurking doubt or any general feeling of unease about the conviction.'³⁰⁵

The Court gave no further guidance on what a 'specific factor' may be but this seems to suggest that the appellant has to raise a specific argument that leads to a lurking doubt rather than just asking the Court to review the evidence and come to its own subjective view as to whether an injustice had been done. This appears to narrow the lurking doubt ambit.

There were a number of cases where the Court made reference to how rare lurking doubt appeals are. In *R v O'Brien*,³⁰⁶ May LJ stated 'we are not persuaded that this is

²⁹⁷ [2002] EWCA Crim 2784.

²⁹⁸ [2005] EWCA Crim 1668.

²⁹⁹ [2002] EWCA Crim 2170.

³⁰⁰ [2002] EWCA Crim 1880.

³⁰¹ [2003] EWCA Crim 3184.

³⁰² [2003] EWCA Crim 192.

³⁰³ [2004] EWCA Crim 2824.

³⁰⁴ [2005] EWCA Crim 3245.

³⁰⁵ *Ibid*, para. 37-38.

³⁰⁶ [2006] EWCA Crim 1419.

one of those comparatively rare cases where, notwithstanding that no persuasive point can be made in support of the appeal other than a lurking doubt, that for that reason the verdicts are unsafe. We are quite satisfied they were not.'³⁰⁷ Similarly, in *R v Robinson*,³⁰⁸ Hallett LJ stated:

'In our view, in a case such as this, it will be rare indeed that a judge will step in and withdraw a case from a jury and it will be rarer still that the Court of Appeal (Criminal Division) will step in and say, without having seen the witnesses, that there remains a lurking doubt. Despite the very thorough and helpful submissions of Miss Dempster, we are not persuaded that this is one of those exceptional cases where there remains a lurking doubt. Accordingly this appeal must be dismissed.'³⁰⁹

In *R v Bell*,³¹⁰ Elias J stated 'we do not think that this is one of those very exceptional cases which cries out for judicial intervention on the grounds that there is a lurking doubt as to the safety of the verdict.'³¹¹

There was evidence of a potentially restrictive approach in *R v Webster*.³¹² The appellant was convicted of rape and the trial judge issued a certificate for appeal on the basis that the jury had only taken one hour and seventeen minutes to deliberate. The judge felt this was not a suitable length of time for a trial that had lasted four and a half days. In deciding whether to issue the certificate, the judge appeared to indicate that this would be a difficult case to get leave for which is why he was considering issuing the trial certificate. The Court dismissed the appeal and Laws LJ stated:

'It seems to us to be very questionable whether apprehensions of the kind apparently felt by the judge here could form a proper basis for a trial judge's certificate. For our part, looking at the facts of this case overall, we are of the clear view that this is not a lurking doubt case. We repeat, the jury were required to decide who they believed. They were in the best position to decide that question. There is no basis with hindsight to hold that their verdict is unsafe.'

In *R v West*,³¹³ the Court was asked to consider whether there was a lurking doubt as to whether the appellant had the necessary intention for a murder conviction. The Court was asked to substitute a manslaughter conviction for the murder conviction. This was on the basis of the appellant's behaviour after the shooting. The Court outlined the difficulty in a case such as this. May LJ stated:

'This court occasionally allows an appeal against conviction by concluding that, because of "a lurking doubt", the conviction should be regarded as unsafe. The

³⁰⁷ *Ibid*, para. 10.

³⁰⁸ [2006] EWCA Crim 1262.

³⁰⁹ *Ibid*, para. 42.

³¹⁰ [2006] All ER (D) 219.

³¹¹ *Ibid*, para. 23.

³¹² [2006] All ER (D) 219.

³¹³ [2007] All ER (D) 346

court does not often reach such a conclusion, for obvious reasons. If lurking doubt is the only suggested basis why the conviction should be seen as unsafe, it will necessarily be the case that the trial was properly conducted and the judge's summing-up is not open to criticism. A jury's verdict, unanimous in this case, is normally, in these circumstances, to be taken as a safe conclusion that they were sure of the Defendant's guilt, by means of properly directed thought processes. They are the judges of fact, the judges of the question of whether they were sure that the Applicant's evidence was in all material respects untrue.³¹⁴

The application for leave to appeal was rejected and May LJ set out the Court's reasoning as follows:

'...although we are emphatically not the judges of fact in a situation such as this, our own reading and consideration of the papers and the summing-up does not lead us to think that this was in truth a borderline case as to intent or indeed in any other respect. For instance, the evidence of the Crown's firearms expert, Mr Tomei, reads in the summing-up more persuasively than that of the Defendant's expert, Mr Dyson, in so far as they differed, which was not enormously.'³¹⁵

This type of lurking doubt case is clearly the most difficult for the Court as it is really being asked to disagree with the verdict of the jury and come to a different decision. It is being asked to decide the same factual issue that the jury had to determine, whether the appellant had intention, but without the benefit of seeing or hearing the witnesses, and reading the case on paper. It is not surprising that the Court would be very reluctant to interfere in such a case as this contradicts the Court's review function and its decision making process is not conducive to determining these appeals. If the lurking doubt ground is being argued with a number of other grounds then the Court may use the other grounds to overturn the conviction if it wishes to. That is much more difficult to justify in cases such as this where there are no other grounds and the overturning of the conviction would clearly be a disagreement with the verdict and a usurping of the jury's role. This would go further than just assessing whether there was evidence upon which the jury could convict and would stray into the territory of the *Pendleton* principle with the Court deciding the issue for itself. But whilst it is clear from cases such as this why the Court would be reluctant to interfere, it is not overly clear what the differences are between this sort of case and the cases where the Court decides that the verdicts were inconsistent so one should be quashed or that the no case to answer submission should not have been rejected. These cases also seem to require the Court to form a view of the evidence, but the difference is those cases are easier for the Court because they are seen to be decided on the basis of a procedural irregularity rather than a lurking doubt, as Leigh argued above. But in practice the arguments appear to be much the same with the Court making a subjective judgment about the conviction based on the evidence.

³¹⁴ *Ibid*, para. 25.

³¹⁵ *Ibid*, paras. 26-27.

The case of *R v West* can be contrasted with the case of *R v Conner*³¹⁶ in the sample. In this case the appellant was convicted of murder. It was accepted that the appellant had been very drunk when he had assaulted an elderly man. The victim had been taken to hospital and had developed a chest infection as a result of his injuries and he had a heart attack and died. The grounds of appeal were that there was insufficient evidence that the appellant intended either to kill the deceased or to cause him really serious harm to leave that question to the jury. Alternatively, it is said that the judge misdirected the jury in a number of respects and that, in any event, the jury could not safely conclude that the appellant had the necessary intention. The Court agreed with Clarke LJ stating that 'in all the circumstances, we do not think that a reasonable jury properly directed could safely conclude that the appellant had the relevant intention. It follows that the judge should have withdrawn the count of murder from the jury.' The Court substituted a manslaughter conviction for a murder one. This case was decided on the basis of a procedural irregularity (not withdrawing murder from the jury) rather than a lurking doubt, however, the Court is essentially being asked to assess the same issue - whether the appellant had the necessary intention. This was rejected in *West* but accepted in *Conner* and whilst the Court is deciding whether a procedural irregularity occurred in *Conner*, it is difficult to see the differences between the two cases other than the Court usurping the role of the jury and deciding the issue for itself. This is illustrative of the Court's inconsistency.

If the Court does have a power to quash convictions where there is no procedural irregularity and no fresh evidence which the lurking doubt ground is supposed to represent, as emphasised by the Privy Council in *Dookran v The State*, then arguably it can quash convictions such as *R v West* above and should be doing so if it feels an injustice has occurred. But, clearly its deference to the jury, its review function and decision making process largely prevent it from doing so. It is clear that there is a large amount of inconsistency and confusion in this particular area.

Summary

There is contradictory evidence as to whether the CAA 1995 has made any difference to this ground of appeal. On the one hand, the similar number of grounds between the two samples with ten out of 300 cases in 1990 and seven out of 300 cases in 2002 would suggest that changing the test to unsafe has not resulted in any major changes. The figures are so negligible in both samples that it is difficult to draw any conclusions as to this ground of appeal quantitatively. It would appear that the RCCJ's hope that the Court would adopt a more liberal approach to these appeals has not been achieved. It is difficult to know whether there are fewer lurking doubt grounds being argued or whether

³¹⁶ [2002] EWCA Crim 471.

there are fewer going through the leave filter, but the 2002 sample confirms that these appeals are extremely rare. As the leave process is decided on paper, it is perhaps not surprising that the Court does not hear many of these appeals. If there are doubts it is going to be difficult to assess this reading a transcript of the judge's summing up. The doubt may be raised by the believability of the witnesses, for example, and that just does not translate to paper.

There were differences in the success rate of the appeals in the two samples which may be an indication of change. In the 1990 sample, six of the ten appeals were successful but in 2002, only one of the seven appeals was successful. This may be further evidence that the CAA has not succeeded in liberalising the Court's approach. There were far more lurking doubt appeals dismissed after the 2002 sample than there were allowed which is also potentially further evidence of a restrictive attitude. The quantitative evidence therefore, would seem to show that rather than encapsulating a supposed liberal approach prior to the enactment of the CAA 1995, the Act succeeded in the Court taking a more restrictive approach to these appeals. The qualitative evidence is also contradictory.

The lurking doubt appeals show that it is extremely rare for it to be argued on its own as a ground of appeal. It is usually linked to a number of others, most notably inconsistent verdicts, and the rejection of a no case to answer submission. As it is usually linked with different grounds it is often difficult to ascertain the approach the Court takes to the lurking doubt ground. But the cases show the Court is reluctant to consider this ground largely because of its deference to the jury. The jury has seen and heard the witnesses, the Court has not, and issues of fact are for the jury to determine, not the Court. If the Court is asked whether it feels a lurking doubt about the case, it is often being asked to review the evidence the jury saw and heard and assess whether the verdict is correct. As this ground is usually considered with other grounds it tends to use those other grounds to allow the appeal in order to counter criticism that it is usurping the role of the jury. This gives the impression that the Court is assessing a procedural irregularity in the appeal rather than the Court forming its own subjective view of the evidence.

But as shown above, there are cases where the Court does appear to form its own subjective view of the evidence and case law would suggest that this is what the lurking doubt ground requires. It appears that the Court does have the power to quash convictions where there are no procedural irregularities and no new evidence and the Court feels that an injustice has occurred. This suggests that the Court can quash the conviction if it believed the appellant was wrongly convicted but the Court does this reluctantly because of its deference to the jury verdict. Although Leigh may argue that the Court has never supplemented its view of the evidence for that of the jury, as this

would fall foul of the *Pendleton* principle, there are certainly cases where this appears to have occurred and cases which suggest this is allowed. The Court's deference to the jury verdict clearly prevents it from doing this too often but the fact that it does appear to do this shows it can.

The changes in the CAA 1995 do not appear to have made any difference to this ground as the Court's seemingly restrictive approach has continued after it. But cases such as *R v B* at least show that the Court is capable of taking a liberal approach even if this is not the Court's general approach to these appeals. The cases demonstrate the inconsistent approach of the Court and its decision making process.

The Court's approach is certainly hampered by its deference to the jury but its review function ensures that the predominant approach is to be restrictive. The Court reviews whether the jury could have convicted and in the absence of any errors which may have affected their decisions and any new evidence which may cast doubt on the verdict, the Court is reluctant to interfere. This ground was deliberately created so the Court would take a more interventionist approach to determining the appeal and specifically where it considered there to be injustice. In this sense it set itself up to fail as the Court's decision making process is not conducive to determining these appeals. As the late former Court of Appeal judge Sir Frederick Lawton has stated:

'The court does not re-try cases...It has to proceed on the basis that findings of fact implicit in the jury's verdict are the facts of the case. It can only disregard them if there is new evidence, or the findings of the jury were perverse, or the court has a lurking doubt. Reading a transcript of evidence is not conducive to raising a lurking doubt.'³¹⁷

This will be discussed in more detail in chapter nine with proposals for reform. In chapter seven the appeals where there is a procedural irregularity will be discussed.

³¹⁷ *The Times*, 23 October 1990.

CHAPTER SEVEN: APPEALS BASED ON PROCEDURAL IRREGULARITIES

As the previous two chapters have shown, the term 'unsafe' is applicable to appeals based on factual error which generally means the jury made a mistake and the appellant was wrongly convicted in the sense that he/she did not commit the crime. This chapter analyses the Court's approach to the term 'unsafe' in the context of procedural irregularities.³¹⁸ These irregularities may occur in a number of ways and these appeals generally have two strands to them. The appellant may be factually innocent and the procedural irregularity has made the conviction unsafe. But the appellant may also be factually guilty in these cases but may still be entitled to the quashing of the conviction. This emphasises an important function of the Court which is to uphold the integrity of the trial process and to protect the right of the appellant to a fair trial which is conducted according to law.

As discussed in chapter three, the Court of Appeal has always shown itself to be more conducive to arguments based on procedural error than those based on factual error. There are far more appeals based on procedural irregularities and far more are successful than those based on factual error, but it is not clear whether this is because more are brought to the Court or whether more are getting through the leave filter. On one level this is easy to understand. An appellant has twenty-eight days in which to appeal after conviction so it is possible in that time to review the pre-trial and trial process to assess whether there were any procedural irregularities. Also, as Pattenden has argued, the principal influence against review of errors of fact has been the Court's reluctance to usurp the role of the jury. The quashing of a conviction because of a legal or procedural irregularity is different because decisions on questions of law and procedure are not the jury's proper province (1996, p.76). This would suggest that the Court has less attachment to its deference for the jury verdict in these appeals which allows for more flexibility. But whatever the reason, the upshot is that a defendant is far more likely to have his conviction quashed on the basis of an error of law or procedure than an error of fact. A consequence of this is that many factually innocent appellants are forced to frame their appeals in technicalities as they (or their lawyers) know that this will give them a higher chance of success. But the problem with that for the factually innocent is that it enforces arguments of procedure on appeal and downplays arguments of factual innocence which leads to the difficulties discussed in chapters five and six.

This chapter analyses the impact the safety test has had on procedural irregularity appeals. It analyses the Court's historical approach to determining these appeals and

³¹⁸ This term is being used to describe grounds of appeal that are not based on fresh evidence nor a lurking doubt. Therefore, it encompasses all kinds of due process appeals.

will compare the cases from the 1990 and 2002 samples. It also analyses the decision making process of these appeals from the 2002 sample in order to ascertain what errors will result in the conviction being quashed and what errors will result in the conviction being upheld. This is necessary to determine what effect the CAA 1995 may have had on these grounds of appeal. There has been a major change between the two samples and that is the enactment of the Human Rights Act 1998 which came into force on 2 October 2000 and this chapter will also analyse the impact the HRA has had on the Court's decision making process.

The historical approach to deciding procedural irregularity appeals

As well as giving the Court the power to allow the appeal 'if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence,' the CAA 1907 also gave the Court the power to set the verdict aside on the ground of a wrong decision on a question of law or that on any ground there was a miscarriage of justice.³¹⁹ There was also a proviso to all of these grounds which allowed the Court to uphold a conviction where there had been an irregularity at the trial but the appellant's guilt had been established by the evidence.³²⁰

The test used to determine the proviso was essentially the one set out in *Stirland v DPP*,³²¹ where the Lord Chancellor, Lord Simon, with whom the rest of their Lordships agreed, stated:

'....it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to section 4(1) of the Criminal Appeal Act 1907 should be applied.'

This test appeared to be an objective one with the Court putting itself in the place of a reasonable jury and assessing the evidence. The difficulty that arose from this was whose standards was the Court supposed to use? Was the Court to judge it by its own standards or the standards of a reasonable jury?

The paradox which was created by the use of the proviso (and the assessment of error) was that in applying it, the Court was usurping the role of the jury in weighing up the evidence against the appellant and coming to a conclusion of fact. As chapters five and six showed, this was the very thing that the majority of the Court would not do when

³¹⁹ Section 4.

³²⁰ 'Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.'

³²¹ 30 Cr. App. R. 40, 46-47.

deciding appeals on errors of fact. Pattenden has argued (1996, p. 182) that the appeal judges were not disturbed by the fact that in order to apply the proviso they had to some extent to take upon themselves the function of the jury and weigh up the evidence against the accused because they wholeheartedly approved of the proviso's purpose.

But there is conflicting evidence as to whether the Court's reluctance to decide issues of fact generally had an impact on its use of the proviso. For example, from its early years, the Court gained a reputation for allowing guilty people to go free if there was a serious error because its reluctance to substitute itself for the jury meant that it was unable to apply the proviso. This is illustrated by the conclusions of the Tucker Committee, which was set up in 1954 to consider whether the Court should be given the power to order a retrial:

'....the Court of Appeal have never considered it to be any part of their duty to substitute their verdict for that of the jury or to make use of their supplemental powers to bring about drastic change in a matter fundamental to criminal practice in indictable cases in this country.....being the way the Criminal Appeal Act has worked in practice it was soon found that there were a number of cases in which there had been some irregularity or misdirection at the trial which could not be dismissed as trivial, and it being impossible to apply the proviso, the Court had no alternative but to quash the conviction and enter a verdict of acquittal, although they might feel little doubt of the appellant's guilt'(paras. 6-7).

This was further illustrated by the speech of the Lord Chancellor when introducing the 1966 Criminal Appeal Bill, which amended the Court's powers, in the Lords for the second reading:

'There has been a general feeling in the legal profession that if you go to the Court of Criminal Appeal for an obviously guilty client who has some technical point, if the technical point is good, then the guilty man gets off; but that if your only complaint is that your client is entirely innocent and had nothing at all to do with the crime, then it is much more difficult.'³²²

However, it was the conclusion of Michael Knight, who conducted a study of all the reported cases from 1907 – 1966, that the 'great majority of cases where the power [of the proviso] has been exercised are cases of serious error' in the trial (1970, p. 15). He stated that 'the court metaphorically blot out the fault...and ask if, without it, there is a strong enough case for an inevitable conviction. And if they can answer 'yes' to this question, they show the Nelson Touch by turning a blind eye to the fault' (p. 16). Knight could give numerous examples where the proviso was applied in spite of serious errors in the trial³²³ but he also concluded that (p.21):

³²² *H.L. Debs*, 12 May 1966, col. 812.

³²³ For example, see *R v Haddy* (1944) 29 Cr. App. R. 182, *R v Farid* (1945) 30 Cr. App. R. 168, *R v Whybrow* (1951) 35 Cr. App. R. 141, *R v Slinger* (1961) 46 Cr. App. R. 244.

'Occasionally, use of the proviso is declined because a particular fault is of nature so serious that, even though the appellate court would like to uphold the conviction, and, even though there probably would be sufficient evidence and direction apart from the fault to justify in their opinion an inevitable finding of guilty by a reasonable jury, their desire to have a deserved conviction must be sacrificed to the general principles of fairness in our criminal trial. This is the principle stated in *Maxwell v DPP* that "it is better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited."³²⁴

There were amendments to the Court's powers in the 1966 Criminal Appeal Bill in relation to procedural irregularities. These were that the words 'on any ground there was a miscarriage of justice' were replaced with 'there was a material irregularity in the course of the trial' and the word 'substantial' was deleted from the proviso. This was the result of a recommendation of the Donovan Committee who felt the word substantial was 'devoid of practical significance' (1965, para. 164).

The new power of the Court to review convictions was set out in section 4(1) of the CAA 1966 (consolidated in the CAA 1968) which now provided:

'The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury³²⁵ should be set aside (a) on the ground that under all the circumstances of the case it is unsafe and unsatisfactory, or (b) that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or (c) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal.'

The proviso now read:

'Provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if they consider that no miscarriage of justice has actually occurred.'

Pattenden has argued that after the enactment of the CAA 1966 (and the CAA 1968), the Court continued to apply the *Stirland* test to determine the proviso. She stated that this was 'sometimes contracted to the simpler form of: Is the evidence against the appellant overwhelming?' (Pattenden, 1996, p.184).³²⁶

The operation of the proviso, and procedural error appeals generally, was discussed by the Royal Commission on Criminal Justice.

³²⁴ Lord Sankey, *Maxwell v DPP* (1934) 24 Cr. App. R. 152, 176.

³²⁵ The phrase 'verdict of the jury' was changed to 'conviction' by section 44 of the Criminal Law Act 1977 to allow the Court to quash a conviction where the appellant had pled guilty at trial.

³²⁶ Citing the cases of *R v Gent* (1989) 89 Cr. App. R. 247, 251; *R v Emmerson* (1991) 92 Cr. App. R. 284, 287; *R v Kabariti* (1991) 92 Cr. App. R. 362, 368; *R v Berry* CA, 12 May 1992; *R v Mitchell* [1992] Crim LR 594; *R v Vye* [1993] 3 All ER 241, 252.

The Royal Commission on Criminal Justice

The RCCJ stated that there was potential confusion as to the scope of the proviso. They stated that its use may be appropriate where there was a material irregularity during the course of the trial but the wording seemed difficult to reconcile with the unsafe and unsatisfactory ground or the wrong decision on a question of law ground. They stated that it seemed from the decided cases that the court did consider whether the unsatisfactory nature of a conviction under either of those two grounds is nevertheless outweighed by the consideration that no miscarriage of justice appears to have occurred (RCCJ, ch. 10, para.30).

As stated in chapter one, the majority of the RCCJ recommended that the grounds should be redrafted to a single ground of appeal. This single ground was whether a conviction 'is or may be unsafe.' If the court is satisfied that the conviction is unsafe it should allow the appeal, but if the court felt it may be unsafe then it should quash the conviction but order a retrial unless a retrial was not possible. The majority saw no need for the proviso because if the court was not convinced the conviction 'is or may be unsafe' it simply dismisses the appeal (ch. 10, para. 32). The RCCJ, therefore, recommended the proviso be abolished which the Government accepted.

The RCCJ had discussed the problem of procedural irregularities and the Court's supervisory role in checking malpractice and misconduct in the trial and pre-trial process. The Commission was split as to what to do about errors at trial. Three of them considered that where there was an error at trial which was sufficiently serious materially to affect the trial, but which did not render the conviction unsafe, the court should generally order a retrial rather than simply quash the conviction. But the majority did not believe that a person who was clearly guilty should be accorded a retrial merely because there was an error at trial (RCCJ, ch. 10 para. 37). The Committee concluded that what they were in agreement about was that appellants should not be able to exploit purely technical irregularities in the conduct of the trial (ch.10, para. 39).

The Commission stated they were not unanimous on what should happen in cases of serious malpractice but nevertheless there was other strong evidence of guilt. Two of them thought that if the pre-trial irregularity or defect was sufficiently serious materially to affect the trial but not render the conviction unsafe, the Court should order a retrial or quash the conviction depending on its view of the gravity of the defect. The rest of the Commission felt that the Court should not quash the convictions on the ground of pre-trial malpractice unless the court thought the conviction was unsafe (ch. 10, para. 48).

The reason for the view of the majority was that it could not be morally right for a person who had been convicted on abundant other evidence and could be a danger to the

public should walk free because of a criminal offence by someone else such as police malpractice. The view of the minority was set out by Michael Zander in his Note of Dissent:

'The moral foundation of the criminal justice system requires that if the prosecution has employed foul means the defendant must go free even though he is plainly guilty. Where the integrity of the process is fatally flawed, the conviction should be quashed as an expression of the system's repugnance at the methods used by those acting for the prosecution....The majority's position would I believe encourage serious wrongdoing from some police officers who might be tempted to exert force or fabricate or suppress evidence in the hope of establishing the guilt of the suspect' (para. 69).

In response to the RCCJ, the Government issued a consultation paper in 1994 (Home Office, 1994). With regard to redrafting section (2) the Government stated it was attracted to the broad approach described by the Commission and it was inclined to support the majority's view that the Court should be concerned only with the safety of the conviction and not with acting as a 'quasi-disciplinary body punishing errors or incompetence occurring in the original trial process' (para.10). With regard to errors at trial, the Government agreed with the majority view 'as a sensible consolidation of the Court of Appeal's practice' (para.11).

The Court's interpretation of the safety test will now be discussed.

The new interpretation of 'unsafe'

There has been much judicial and academic debate after the enactment of the CAA 1995 in relation to errors of law and procedure and the safety test.³²⁷ The debate has centred round the role of due process on appeal in light of the changes to the law and also the impact the Human Rights Act 1998 has had. The concept of due process on appeal can appear to be complicated as it may have a number of facets which may or may not require different decision making approaches. As Nobles and Schiff have stated:

'....the value identified in due process other than its contribution to truth is elusive. Sometimes it is articulated in terms of suspects' rights. At other times it is seen as a general right to fairness, requiring that a person be subjected only to fair procedures and treatment. And at its most general level it is associated with the theme of the rule of law' (Nobles and Schiff, 2001, p. 911).

The difficulty for the appeal court is deciding when the irregularity will result in the conviction being quashed, particularly when the appeal court views the appellant as guilty. This involves the appeal court adjudicating upon notions of rights and fairness which may not be easy to articulate or encapsulate given the general inconsistency of appeal court decision making. As the history of the proviso has shown above, the Court

³²⁷ See, for example, Dennis (2003), Nobles and Schiff (2001), Clarke (1999), and Ormerod and Taylor (2004).

had up to the CAA 1995, the power to uphold convictions where it considered breaches of due process to be insignificant. The question after the enactment of the CAA 1995, was what approach would the Court take to procedural irregularity appeals; did the amending of the test narrow the Court's powers or did it, as discussed during the debates on the bill, merely restate the existing practice of the Court? Before the judgments are analysed, it is necessary to outline the case law from 1995 to 2002 in order to put the 2002 judgments in context. This will help to understand any potential changes either as a result of the new safety test or the Human Rights Act 1998 which came into force in 2000.

As discussed above, it had been settled law prior to the amendment by the CAA 1995 that the Court of Appeal had the power to quash convictions regardless of whether the Court considered the appellant to be factually guilty. For example, in *R v Madhi*³²⁸, the Court of Appeal quashed the conviction on the basis of an abuse of process,³²⁹ even where there was no suggestion of the defendant not having a fair trial.³³⁰ It would appear that this approach was initially followed after the enactment of the CAA 1995. In *R v Hickey and others*,³³¹ Roch LJ stated:

'This court is not concerned with the guilt or innocence of the appellants; but only with the safety of their convictions. This may at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.'

However, in *R v Chalkley*, *R v Jeffries*³³² it was held that the Court of Appeal did not have the power under the new test to allow an appeal if it thought the appellant was factually guilty but was dissatisfied in some way with the trial process. The approach taken in *Chalkley* appears to echo the views of the Government in its response to the RCCJ that the Court was not to act as a 'quasi-disciplinary body' as discussed above. This directly contradicts the views of those during the debates on the Criminal Appeal Bill that the changes were to restate existing practice. It would appear that in changing the test, the Government wished to curtail the Court's power of quashing the

³²⁸ [1993] Crim LR 793.

³²⁹ The judge has the power to stay proceedings where there is improper or unlawful conduct by a state agent. The Court of Appeal will generally be called upon to decide whether this should have happened if a request by the defence was refused and the defendant appeals on that basis. See generally Choo (2008) and Corker and Young (2003).

³³⁰ See also *R v Blackledge* [1996] 1 Cr. App. R. 326, where it was held that a material irregularity could result in the conviction being quashed even when there was no doubt that the appellant was guilty. In this case the conviction was quashed despite a plea of guilty.

³³¹ CA, unreported, transcript 30 July 1997. Case No: 96/5131/S1.

³³² [1998] 2 All ER 155.

convictions of those it considered to be guilty. If so, the Court in *Chalkey* was interpreting the new test in this context.

This case was followed a number of times by the Court³³³ and there has been confusion as to whether it was effectively overruled by the case of *R v Mullen*³³⁴ and the subsequent enactment of the HRA. The appeal court in *Mullen* followed the approach of *Hickey* and adopted a broad interpretation of unsafe which moved away from *Chalkley* to revert back to the approach taken by the Court of Appeal prior to the 1995 Act. This emphasised that the Court still performed a supervisory role in assessing the overall fairness of the prosecution process. Mullen's conviction had been secured after he was illegally extradited from Zimbabwe and he argued there was an abuse of process. There was no suggestion that he had not had a fair trial, his argument was that it was not fair to try him. There was authority for Mullen's position from *R v Horseferry Road Magistrates' Court ex p Bennett*³³⁵ and *R v Latif and Shahzad*³³⁶ where the abuse of process doctrine had been extended to those where the fairness of the trial was not in issue. But in *R v Martin*³³⁷ the House of Lords was asked to decide whether a Court-Martial trial was an abuse of process. The Lords appeared to suggest that an abuse of process would not be sufficient to quash the conviction as the decision would then have to be made as to whether the abuse had made the conviction unsafe.

But the appeal court in *Mullen* adopted a broad interpretation of unsafe with the Court deciding that the amendment in the CAA was to restate the existing practice of the Court of Appeal. Cases such as *Bennett* and *Latif* showed that the conviction could be overturned as a result of an abuse of process even where the appellant had had a fair trial. Therefore, the Court's authority to quash the convictions of those considered guilty was reinstated despite Auld LJ's judgment in *Chalkley*, and the Government's response to the RCCJ. This position was to gain much more prominence with the enactment of the Human Rights Act but there was initially confusion as to which judgment to follow, *Mullen* or *Chalkley*.

The Human Rights Act and 'unsafe'

There has been much debate on the impact the HRA has had on criminal appeals. This debate has largely derived from the rights provided in Article 6 and the role of 'unfairness' on the test of unsafety. This is not a new language for the Court as from its

³³³ *R v Rajcoomar* [1999] Crim LR 728; *R v Callaghan* 5 March 1999, unreported; *R v Hewitson and Bramich* [1999] Crim LR 307; *R v Thomas* [2000] 1 Cr. App. R. 447; *R v Blackwood (Junior)* 10 March 2000, unreported; *R v MacDonald* [1998] Crim LR 808.

³³⁴ [2000] Q.B. 520.

³³⁵ [1993] All ER 138.

³³⁶ [1996] 1 All ER 353. The appeal was upheld but eventually quashed in 2007 on the basis of non disclosure of evidence after a reference by the CCRC [2007] EWCA Crim 307.

³³⁷ [1998] 1 All ER 193.

early days the Court has considered part of its role is to ensure that the accused had a fair trial.³³⁸ But the HRA made fairness much more of an issue for the Court in relation to section 6 which states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Also, section 3 which states 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' This required the safety test to be compatible with the Convention, most notably the concept of fairness in Article 6. There were some who thought the law may have to be changed. Lord Justice Buxton, for example, argued that section 2 of the CAA 1995 might have to be redrafted in order to ensure compliance with the Convention (Buxton, 1999, p. 12). In the case of *Condrón v United Kingdom*,³³⁹ the European Court of Human Rights (ECtHR) made clear that the question of fairness could not be subsumed within that of safety in the sense of factual guilt.

There have been a number of different approaches to the issue of fair trials and safety. This is not surprising given the inconsistency of the Court's decision making. Dennis (2003) divides the approach of the Courts into three positions, the contingent position, the quasi-absolutist position and the absolutist position.

The contingent position is represented by a number of cases and would appear to be the predominant approach. This essentially means that unfairness is a matter of degree and it is not all cases of unfairness that will result in an unsafe conviction. This is illustrated by cases such as *R v Davis, Rowe and Johnson*,³⁴⁰ and *R v Francom*,³⁴¹ where the Court applied the *Stirland* test to determine the appeal.³⁴² *Davis* followed the approach taken in *Mullen* and quashed the conviction despite declaring 'this is not a finding of innocence, far from it.' It is further illustrated by cases such as *R v Botmeh and Alami*³⁴³ and *R v Cranwell*.³⁴⁴

The quasi-absolutist approach is illustrated by the case of *R v Togher*.³⁴⁵ In this case, the appellants had pled guilty at trial and the Court was deciding between *Chalkley* and *Mullen* in terms of which authority to follow. The Court chose *Mullen* stating that an unfair trial would almost inevitably be unsafe. This case was endorsed by two judgments of the House of Lords, *R v Forbes*,³⁴⁶ and *R v A*³⁴⁷ which appeared to apply the

³³⁸ *R v Christie* [1914] A.C. 545. For a discussion on this see Dennis (2003).

³³⁹ [1999] Crim.L.R. 679.

³⁴⁰ [2001] 1 Cr App R 115. They are more commonly known as the 'M25 three.'

³⁴¹ [2000] All ER (D) 1131.

³⁴² See also *R v Williams* [2001] EWCA Crim 932 and *R v Fitton* [2001] EWCA Crim 215 which follow *Francom* and apply the *Stirland* test.

³⁴³ [2002] 1 Cr. App. R. 28, at para 27.

³⁴⁴ [2001] EWCA Crim 1216.

³⁴⁵ [2001] 3 All ER 463.

³⁴⁶ [2001] 1 A.C. 473.

³⁴⁷ [2001] 1 A.C. 473.

absolutist approach that if the trial was unfair then this should lead to an unsafe conviction, though this appeared to be refuted by the House in *R v Lambert*.³⁴⁸ The evidence was therefore conflicting as to the approach that should be adopted when the Court was deciding whether unfairness had led to unsafety and when the conviction would be quashed.

It is important to point out at this stage that the quashing of the conviction is not the only remedy provided for breaches of fairness under the Convention. Whilst the majority of judicial and academic opinion has focussed on when fairness will result in an unsafe conviction, the Court does have other options other than overturning the conviction. Under section 8 of the HRA, the Court has the power to order any remedy which is 'within its powers as it considers just and appropriate.' The Court may make a declaration of violation. It would also appear that the Court has the power to remedy a fundamental defect that has occurred at trial by the appeal proceedings. This may occur where evidence is admitted on appeal that was not disclosed at the original trial as in *Edwards v United Kingdom*.³⁴⁹ This case was used as authority in *R v Craven*³⁵⁰ where the Court weighed up evidence of an undisclosed fingerprint against DNA evidence in the form of blood on the shirt of someone close to the victim at the time of the attack. The Court appeared to conclude that the appellant was guilty and upheld the appeal.³⁵¹ It has also been suggested that the Court may be able to grant a remedy in damages or reduce the sentence. (Emmerson and Ashworth, 2001, p. 530-531).

Dennis has argued that there are two key principles for defining the relationship between fairness and safety. The first principle relates to the nature of the violation of the defendant's right to a fair trial:

'Improper conduct by the investigating or prosecuting authorities may make it unfair to try the defendant at all. If the trial was unfair in this sense then the conviction is necessarily unsafe. This principle thus reflects a strong meaning of the term "abuse of process" ' (Dennis, 2003, p. 214).

Dennis suggests that unfairness of this type will always render the conviction unsafe. The second principle is concerned with the effects of a violation of the right to a fair trial:

'It asks whether the irregularity had the effect of significantly hampering the defendant in the conduct of the defence so that the outcome of the trial might have been different but for the irregularity. If so the conviction is unsafe, and it would therefore be an abuse of process (in a different sense) to let it stand' (Dennis, 2003, p. 214).

³⁴⁸ [2001] 3 All ER 577.

³⁴⁹ (1992) 15 EHRR 417.

³⁵⁰ [2001] 2 Cr. App. R. 12.

³⁵¹ See page 92 above.

Dennis indicates that here the safety of the conviction depends on a number of factors and although he would consider this an abuse of process 'it 'lacks some of the pejorative impact' of the type above. This distinction between 'unfair to try' and 'fair to try but an unfair trial' can be illustrated from the above cases so in this sense it could be argued that the Court has produced a consistent approach in these cases. But whilst we may be able to draw a distinction between these cases on this basis, concepts such as integrity and fairness are not so easy to define in terms of the Court's decision making process. Nor is it easy to predict when the conviction will be quashed.

There is some general guidance from the cases as to how the Courts define 'unfairness.' In *R v Hanratty* (in the 2002 sample), Lord Woolf drew a distinction between 'procedural flaws which are technical and those which are not.'³⁵² He cited this speech by Lord Bingham in *Randall v The Queen*:

'While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.'³⁵³

It would appear that 'technical' unfairness does not always result in the conviction being quashed whilst gross procedural unfairness does. But whilst the judges may make these distinctions, it is not overly clear how they decide what is 'technical' and what is 'gross.'

There is a theoretical argument underpinning the relationship between fairness and safety and the Court's role in deciding these appeals. Dennis likens the relationship between unfairness and safety to the jurisprudence of section 78 of PACE. He argues that the rationale of the exclusionary discretion under section 78 is the need to safeguard the legitimacy of the verdict. He says that when the Court of Appeal reviews the safety of the conviction it is performing the same function ie safeguarding the legitimacy of the verdict. Dennis seems to be suggesting that section 78 can be viewed

³⁵² [2002] EWCA Crim 1141.

³⁵³ [2002] UKPC 19, at para. 28.

in the same way as an abuse of process in that if there is misconduct on the part of the authorities then the evidence can be excluded in the same way that the trial proceedings may be stayed as an abuse of process. Therefore, in applying legitimacy theory to the Court's role in determining fairness and safety, Dennis is suggesting that if the moral legitimacy of the conviction is weakened then this is an abuse of process and the remedy should be the quashing of the conviction.

Ashworth and Redmayne, however, are not so keen on terms such as legitimacy and integrity. They state:

'...in developing a framework for considering when unfair convictions should be quashed and when upheld we are not attracted to solutions which put significant weight on such vague concepts as legitimacy and moral integrity, unless more is said about what those terms mean' (Ashworth and Redmayne, 2005, p. 357).

But this has been criticised by Choo. He states:

'The notion of moral integrity, which some believe may have been 'oversold',³⁵⁴ has been criticised for its supposed vagueness and for its supposed failure to treat violations of defendants' rights, especially important rights such as Convention rights, with the seriousness that they deserve. This is not, however, so' (Choo, 2008, p. 190).

This notion of moral legitimacy, or moral integrity,³⁵⁵ has been discussed by Ormerod and Taylor in relation to fairness and safety. They argue that 'although moral integrity is a significant foundation of abuse of process and has a part to play in the determination of safety that does not mean that the two are synonymous concepts. The concepts of safety and abuse are not coterminous: there is a gap' (Ormerod and Taylor, 2004, p. 268). They went on to say that 'there are many instances where a verdict might be considered to be unsafe yet the conditions to satisfy an abuse are not met' (p. 282). They also argue that the Court's 'refusal to accept a direct correspondence between unfairness and unsafety...offers an incoherent scheme of appellate control in the criminal process. In particular, it permits the Court to place too much weight on the factual guilt of the appellant' (p. 279). They stated that 'unfairness and unsafety are not coterminous but the gap between them ought to be narrow' (p. 283). They hoped for the Court to develop a more 'principled' approach to decision making which is based on the grossness of the violation, not on the more 'pragmatic' approach of whether the appellant committed the crime.

³⁵⁴ Citing Ashworth and Redmayne, 2005, p. 333.

³⁵⁵ For a wider discussion on the integrity principle, see Ashworth (2003).

This hope for a more principled approach was echoed by Lord Browne-Wilkinson. He states that traditionally the approach to judicial decision making is what he calls the 'dirty dog principle':

'This is the principle which lies at the heart of the common law. It is the basis by which the overwhelming majority of cases are decided. The judge looks for what are called 'the merits' and having found them seeks to reach a result, consistent with legal reasoning, whereby the deserving win and the undeserving lose.' (Browne-Wilkinson, 1998 p. 21)

He states that this judicial method is seldom reflected in judicial behaviour or in the reasons given by judges for their decisions. He states that as a result of the dirty dog principle the features of current judicial reasoning are:

'First, the actual decision is primarily based on moral, not legal, factors. Second, those moral reasons are not normally articulated in the judgment. Third, the morality applied in any given case is the morality of the individual judge, although this will to some extent reflect the values of contemporary society' (p. 22).

This dirty dog principle reflects the crime control model and would explain a number of problems associated with the Court such as the Court's unwillingness to admit fresh evidence, the Court's reluctance to interfere with jury verdicts in the absence of any errors, its willingness to uphold convictions when it deems the error has been harmless and its willingness to uphold convictions when there is strong prosecution evidence. However, Browne-Wilkinson went on to say that with the advent of the Human Rights Act, 'moral attitudes which have previously been the actual, but unarticulated, reasoning behind judicial decisions will become the very stuff of decisions on Convention points.' Further, he argues that:

'The moral judgment involved will no longer be the moral viewpoint of the individual judge. Once the moral and practical reasons which are the basis of the judge's decision are stated in the reasons given by the judge, higher courts will have to review and if necessary modify those decisions. There should emerge, as there has indeed under the Strasbourg jurisprudence, a code of morals reflecting the input of many different viewpoints and not merely the prejudices of the individual. This will, I hope, put an end to the most extreme versions of the dirty dog principle – now primarily espoused by the tabloid press – that because an individual is guilty of a serious crime he has lost all his rights to fair treatment' (p.22).'

It would seem that what Browne-Wilkinson, and Ormerod and Taylor, hoped for was the HRA resulting in a resurgence in moral integrity or moral legitimacy into the judicial decision making process. This would presumably mean more focus on the seriousness of the procedural irregularity, and more unfairness resulting in unsafe convictions, even

if the appellant was guilty. However, Nobles and Schiff were doubtful whether this shift in approach would take place. After reviewing the *Togher* case, their conclusions were:

'Changing the Court of Appeal's legal authority by statutory amendment has, in the past, done little to alter its treatment of appeal cases. The Human Rights Act can be viewed as simply another alteration to the formal grounds for appeal. But unless it alters the Court's view of what constitutes a serious irregularity it will make little difference to the outcome of appeals. While the language of rights may be a new addition to Court of Appeal judgements it will not, by itself, alter the Court's view of which irregularities justify freeing those thought to be guilty, and who on their own admission have admitted to being guilty, of serious offences' (Nobles and Schiff, 2001, p. 922).

Nobles and Schiff, therefore, appeared to be doubtful that the HRA would bring about a significant change with the Court continuing to focus on the guilt of the appellant rather than the seriousness of the irregularity. This is a difficult area to analyse because there are differing views as to which one the Court should prioritise, and how we define the Court's approach. Whilst Ormerod and Taylor may argue that if the Court focuses on the seriousness of the irregularity it is being 'principled' and if it focuses on the guilt of the appellant it is being 'pragmatic,' these terms are interchangeable and can apply equally to both approaches. If the Court is upholding the conviction despite a serious irregularity because it considers the appellant to be guilty then this could be considered to be a 'principled' approach if the view is taken that the Court should prioritise upholding convictions of those it considers to be guilty.

It is also difficult to define the Court's approach to this area as being liberal or restrictive. For fresh evidence or lurking doubt appeals it may be possible to define the quashing of the conviction as the Court taking a more liberal approach because the appellant is essentially arguing he/she did not commit the crime. Therefore, these appeals do not require the balancing exercise the Court has to perform in procedural irregularity appeals where it has to weigh up the seriousness of the irregularity against other factors to conclude whether the irregularity made the conviction unsafe. If the Court quashes the conviction of someone considered to be guilty because the irregularity is a serious one then it is difficult to argue that the Court is taking a more liberal approach here. The fact that the conviction is overturned can be used by those who use successful appeals to argue the Court is being liberal but for those who would say the role of the Court is only to overturn the convictions of those who are factually innocent, then the Court's so-called 'liberal' approach in quashing the conviction could be subject to criticism.

Therefore, this chapter will analyse the Court's approach to procedural irregularities on the basis of whether it is taking a strict or less strict approach to the procedural irregularity itself in the sense of whether it is giving more weight to the procedural irregularity (less strict) or to the guilt of the appellant (strict). The 1990 and 2002 samples

will be compared in order to ascertain any differences between them. There will then be an analysis of the 2002 sample in terms of the Court's decision making process in these appeals. This will be necessary to see if there are any identifiable approaches the Court uses to determine these appeals and whether there are any identifiable categories of procedural irregularity in terms of what will result in the conviction being upheld or overturned. There will also be an analysis of what impact the HRA has had on criminal appeals. The 1990 and 2002 samples will now be analysed.

The 1990 and 2002 sample of judgments

The general findings of tables 4.3 and 4.4 in chapter four will now be compared in order to provide a general picture of the differences between them. These tables are taken from the 1990 and 2002 samples of judgments.

Both samples show that the majority of grounds are procedural irregularities with very few based on factual error. In the 1990 sample, fresh evidence grounds were 7% of the total grounds with 6% in the 2002 sample, and 'lurking doubt' type grounds were 2% in 1990 (generally unsafe and unsatisfactory) and 1% in 2002. Therefore, the 2002 sample appears to confirm Malleson's findings that most of the Court's time is spent reviewing the decisions of the trial judge and that it is rare for the Court to hear fresh evidence or consider the existence of a 'lurking doubt' (Malleson, 1993, p. 15).

In the 1990 sample just over one third of the appeal grounds reviewed were allowed (101)³⁵⁶ which represents 31% of the total grounds. In the 2002 sample, there were 76 appeal grounds allowed which represents 12% of the total grounds so the Court was clearly allowing fewer appeal grounds in 2002 than in 1990. If those grounds of appeal are removed which include fresh evidence and lurking doubt this gives us a clearer picture of the approach to procedural irregularity appeals. We can also discount the 'other' or 'not specified' category as these may not necessarily be procedural errors. The fresh evidence, lurking doubt (generally unsafe), 'other' and 'not specified' amount to thirteen grounds allowed in the 1990 sample so if those figures are deducted we get a procedural irregularity figure of eighty-eight grounds allowed. There were thirty-nine of these grounds dismissed or refused so they can also be deducted from the total grounds along with the figures adjourned (six). This means of the total grounds in 1990, 271 were based on procedural irregularities. Therefore, of the 271 procedural irregularity grounds, eighty-eight were allowed which equates to 32%.

If we replicate these figures for 2002, the number of procedural irregularity appeals allowed is fifty-eight (eighteen deducted). The number of procedural irregularity

³⁵⁶ There is a discrepancy in the figures. The table says 102 grounds allowed but the figures add up to 101.

grounds dismissed is 510 (eighty-six deducted). There was one ground deducted for being adjourned. Therefore, of the 590 procedural irregularity grounds, fifty-eight were allowed which equates to 10%. The differences between the samples are partly explained by the large increase in grounds in 2002. This shows that despite the large increase in grounds, it has become more difficult to succeed as there was a much higher chance of success with a smaller number of grounds in 1990. This shows that increasing the grounds of the appeal does not necessarily result in a higher chance of success.

The most common grounds argued in both samples were the same, being errors of the trial judge. In Malleson's sample these constituted 59% of the total grounds and 49% in the 2002 sample. When comparing the three most common grounds in the samples – misdirection on the law or evidence, defective or unbalanced summing up and evidence wrongly excluded or included, they all show there were more appeals allowed in the 1990 sample than the 2002 sample. In the 1990 sample, seventy-seven (40%) of these grounds were allowed with 115 (60%) dismissed or refused. In the 2002 sample, fifty-seven (18%) of these grounds were allowed with 256 (82%) dismissed or refused. This shows that fewer appeals were allowed in 2002 with these grounds and appears to confirm the general statistics discussed in chapter four that there were fewer appeals allowed in 2002.

The 2002 sample shows the impact the HRA has had on criminal appeals. There were 22 grounds based on breaches of Article 6 with none of them successful. There were 5 grounds based on breaches of other Articles in the HRA but again, none of them were successful. This is potentially evidence that whilst the HRA had given appellants an additional basis for arguing the appeal, the Court at this stage was not being too receptive to them. Similarly, there were 23 grounds based on an abuse of process but again, none of them were successful. This would appear to show that the Court was adopting a strict approach to deciding these issues as, as discussed above, the abuse of process ground and fairness arguments relating to Article 6 are potentially the most illustrative of the Court's approach to the HRA. This is because the abuse of process ground relates to whether it is fair to try the defendant and the fairness arguments generally relate to whether the defendant had a fair trial. This will be discussed in more detail below when the individual appeals are analysed.

Despite potential evidence that the Court has adopted a strict approach to procedural irregularities, the HRA has clearly contributed to the expansion of grounds argued and may also have had an impact on the abuse ground in terms of more being argued as Malleson does not list any abuse grounds in her sample. This may be the impact of cases such as *Bennett*, *Latif* and *Mullen* where these arguments are now being made

much more frequently than prior to 1990 once the Court confirmed they came within the safety test. Though as the above has shown these arguments are not necessarily being successful in terms of convictions overturned. The impact the HRA had initially on the Court was outlined in the Annual Review of the Criminal Division of the Court of Appeal by Lord Woolf. He stated:

‘On the 2 October 2000 the provisions of the Human Rights Act 1998 came into force. In the period between October 2000 and the end of March 2001 some 13.6% (137 cases) of appeals against conviction and some 3.8% (107 cases) of appeals against sentence raised a human rights issue....In general, the issues that have been raised are part of other more general grounds of appeal (e.g. abuse of process, admissibility of evidence). Very few cases have been initiated solely on human rights issues.’³⁵⁷

This is borne out by the 2002 sample and shows that the HRA has impacted on the number of appeals to the Court and also the number of grounds. The rise in the number of grounds could also be explained by the contribution the CCRC has made. In a recent review of cases referred to the Court, former Commissioner Laurie Elks stated:

‘....there remains a case to answer [for the CCRC] that in pursuing the issue of the safety of convictions brought before it, the Commission has, at times, given undue consideration to technical legal considerations in its investigation and referrals’ (Elks, 2008, p. 345).

This may partly explain the increase in the different types of procedural irregularity but little difference with the fresh evidence and lurking doubt grounds. As Elks himself concedes ‘it is...quite a long step from the redress of the kind of miscarriages of justice which prompted the formation of the Commission, to the referral of a conviction upon the ground that the jury should have been warned in slightly different terms about the considerations to be applied in deciding whether to draw any adverse inferences from silence’ (Elks, 2008, p. 345).

This last point also illustrates a possible reason for the rise in procedural irregularities between the two samples which is the changes in procedure such as the right to silence and the disclosure regime. This possibly explains the rise in the non-disclosure of evidence grounds which do not feature in the 1990 sample. But surprisingly there are no grounds based on police or prosecution malpractice in 1990 whereas in 2002, there were 3 appeals allowed on the basis of police malpractice and 1 allowed for prosecution ‘errors.’ There were 9 prosecution error grounds rejected and 8 police malpractice grounds rejected in 2002 which shows that whilst the Court

³⁵⁷ *Annual Review of the Criminal Division of the Court of Appeal April 2001 to March 2002*. Available from <http://www.hmcourts-service.gov.uk/cms/1500.htm>.

is able to accept it does happen, the grounds are more likely to be rejected than accepted.

The 2002 sample appears to confirm Ormerod and Taylor's argument that there is a gap between abuse and safety. The wide variety of procedural irregularities shows that an abuse of process is only one of them, albeit that it might encompass a large number of areas and some of those areas may be listed separately in the table. The grounds listed as an abuse of process are where the appellant specifically referred to that term, though the police malpractice grounds and the prosecution errors may well have come within that broader definition.

The 2002 sample will now be analysed qualitatively in order to determine what the Court's approach is to determining these appeals.

The Court's approaches to determining the appeal

As discussed in chapter two, as well as replicating Malleson's study, I also added an additional element which was to collate the various decision making processes of the Court in order to determine what the approaches were. The aim in collating the different approaches was to see how the Court approaches its task in order to try and ascertain why the decision making of the Court can be so problematic.

Whilst the 2002 table shows that a large number of irregularities can be identified from the judgments, the Court uses a small number of approaches to determine procedural irregularity appeals as the diagram in chapter four shows.³⁵⁸ By far the most common approach used was the Court disagreeing that an irregularity had in fact occurred with the appeal being upheld. This approach was taken in 179 appeals. In contrast, the second most common approach was the Court determining that the irregularity had made the conviction unsafe or leave granted. There were 45 of those appeals. The third most common approach was that the irregularity may have had an impact on the jury and the conviction was unsafe or leave granted. There were 17 of those appeals. The fourth most common approach was that the Court considered the irregularity did occur but that there was strong prosecution evidence so the appeal was upheld. This occurred in 14 appeals. The fifth most common approach was that the Court considered the irregularity to be minor and the conviction was upheld as it did not impact on the safety of the conviction. There were 11 of those. The final approach is the *Stirland* test of would the jury have inevitably convicted if the irregularity did not occur. This would result in the conviction being upheld if yes and quashed if no. This occurred in 3 appeals. There did not appear to be any decisions of the Mullen type

³⁵⁸ See page 69. The word 'error' in the diagram is used to signify a procedural irregularity. See appendix two for the form used to collate the approaches.

where the conviction is quashed with the Court overtly viewing the appellant as guilty though this may have been implied from some of the judgments. There were also no references to the appellant's innocence directly in the judgments. The decision to include those where leave was granted, rather than just concentrate on those where the appeal was determined, was made to analyse as many judgments as possible and also the Court often decides whether the conviction is unsafe at the renewed application for leave stage so it is not always possible to separate them in those cases.

On a general view, these approaches appear to show the Court taking a fairly strict approach to determining the appeal and either deciding that the irregularity did not occur or that it was minor or that there was strong prosecution evidence. In a large number of appeals, the Court is disagreeing that the irregularity took place and the appellant or counsel for the appellant is unable to persuade the Court otherwise. The judgments show the Court weighing up the evidence in the case against the strength of the irregularity and either deciding on the basis of what the Court itself thought or what a jury would have made of the irregularity. The types of grounds argued and how these appeals are decided in practice will now be discussed. First, the appeals allowed by the Court will be analysed.

The Court thinks the irregularity made the conviction unsafe

This section sets out the grounds of appeal argued by the appellant/applicant where the Court uses a subjective approach and decides the irregularity made the conviction unsafe or that leave to appeal should be given. This is the largest category of appeals allowed. These cases all potentially show the Court taking a less strict approach to the procedural irregularity as the conviction is overturned. This decision making process is illustrated by the following cases.

There was evidence in this category that the HRA had had an impact on the Court's decision making. For example, there were judgments where the appellant had not raised the issue of a fair trial, but the Court used this terminology in deciding the appeal was allowed. These cases included previous convictions being incorrectly included;³⁵⁹ misdirection on the burden of proof;³⁶⁰ and an unbalanced summing up.³⁶¹ But there were two other cases which were potentially raising HRA-type grounds as both involved police malpractice. In *R v Irvine*,³⁶² the appellant was convicted of robbery and manslaughter. He was tried with two co-accused, Twitchell and McCloy. The conviction of Twitchell was overturned on appeal due to the police

³⁵⁹ *R v Bartholomew* [2002] EWCA Crim 1312.

³⁶⁰ *R v Davies* [2002] EWCA Crim 268.

³⁶¹ *R v J* [2002] EWCA Crim 1218.

³⁶² [2002] EWCA Crim 29.

being discredited and Irvine's case was then referred to the Court. The appeal was allowed as the confession of Twitchell was discredited and the only other evidence was what he had supposedly said in the police car which was now accepted not to be true. Similarly, in *R v Brignall, R v Barnes*,³⁶³ two police officers involved with the case were awaiting trial for allegedly perverting the course of justice in another case. There was also a suspicion by other police officers that the van they were in which had been seized because it contained drugs had significantly less drugs in it when it arrived at the police station so by implication those officers had stolen it some of it. The appeals were allowed because of this and a retrial was not ordered because of the behaviour of the police in the case. These cases show that the procedural irregularity may have an impact on the quality of the evidence. If the proper procedures are not followed to obtain the evidence then it may be fabricated in order for it to be viewed as overwhelming evidence of guilt. If the evidence has been fabricated then it is important that the Court does not just accept it as evidence of guilt and gives weight to the procedural irregularity that resulted in it being obtained. This can be a difficult balancing exercise for the Court but these cases are examples of the seriousness of the irregularity outweighing what can appear to be strong evidence of guilt which may have been fabricated. They could also be examples of the Court acting in a 'quasi-disciplinary' way and allowing the appeals as a punishment to the police contrary to the views of the RCCJ and the Government as discussed above.

There was no reference made to a fair trial in the other cases in this category but there were two cases which raised interesting issues. In *R v Johnson*,³⁶⁴ the Court noticed the judge's misdirection of the law relating to aggravated burglary. This had not been raised in the grounds of appeal. The Court allowed the appeal and substituted a verdict of affray. This shows that the Court is capable of taking an interventionist approach when it wants to and is not bound by the grounds of appeal that leave was granted for. In *R v Deacon, R v Seymour*,³⁶⁵ Mr Justice Gibbs made reference to the written reasons of the single judge in refusing leave. These reasons were described as 'unanswerable' by Justice Gibbs but he then went on to say with the benefit of oral argument from appellant counsel, the Court was persuaded to grant leave. This shows the problems of the leave decision being made on paper and the benefit of oral argument. This possibly suggests that if the leave process was one of oral argument there may be more applicants granted leave to appeal. However, this appeal was later heard in the sample and the appeal was dismissed.³⁶⁶ There was one case in this category which required that the Court make a declaration of the law.

³⁶³ [2002] EWCA Crim 569.

³⁶⁴ [2002] EWCA Crim 933.

³⁶⁵ [2002] EWCA Crim 260.

³⁶⁶ [2002] EWCA Crim 1460.

In *R v Natji*,³⁶⁷ the Court held the Public Bodies Corruption Practices Act 1889 did not apply to civil servants.

The majority of cases in this category argued errors by the trial judge as the procedural irregularity. These ranged from the judge intervening too much during the trial, to wrongly telling the jury to draw adverse inferences from silence, to the judge misdirecting on the standard and burden of proof.³⁶⁸ These cases all illustrate that the Court viewed the judge's error to have made the conviction unsafe.

There were other cases in this category that did not relate to errors of the trial judge. For example, in *R v Bains*,³⁶⁹ evidence emerged that the complainant had misled the jury about her relationship with another man; in *R v Atkinson*,³⁷⁰ there were inconsistent verdicts with a co-defendant; in *R v Shepherd*,³⁷¹ an application was made under section 6 of the Criminal Appeal Act 1968; in *R v Hall*,³⁷² the barrister at the trial was seriously ill with cancer; in *R v Sims*,³⁷³ there was non-disclosure of evidence that one of the complainants had had counselling prior to the trial; in *R v Farah*,³⁷⁴ a witness who testified that the applicant had confessed to him now wanted to retract that statement; in *R v Fernandez*,³⁷⁵ the law had now changed in *R v K*³⁷⁶ and the Crown no longer sought to uphold the conviction; in *R v Smith*,³⁷⁷ the appellant was convicted of murder. After the conviction for the murder, the appellant killed his cell mate and was able to successfully plead diminished responsibility for the second murder. He argued his conviction for the first murder was unsafe because of the personality disorder diagnosed for the second killing. The Court agreed and substituted a manslaughter conviction for a murder one. The final case in this category is *R v Downing*.³⁷⁸ This was discussed in chapter five in relation to fresh evidence. The appellant was convicted of murder and the grounds of appeal were new forensic evidence of bloodstaining and also his confession was unreliable and should have been excluded. The Court considered that the confession was not reliable and quashed the conviction.

³⁶⁷ [2002] EWCA Crim 271.

³⁶⁸ In *R v Logindice* [2002] EWCA Crim 929; *R v P* [2002] EWCA Crim 216; *R v McHale* [2002] EWCA Crim 183; *R v Shanks* [2002] EWCA Crim 489; *R v Jacobs* [2002] EWCA Crim 610; *R v Lester* [2002] EWCA Crim 947; *R v Rhodes* [2002] EWCA Crim 1390; *R v Kinneir* [2002] EWCA Crim 902; *R v G* [2002] EWCA Crim 550; *R v D* [2002] EWCA Crim 157; *R v Davies* [2002] EWCA Crim 85; *R v Harris* [2002] EWCA Crim 1597; *R v Fox* [2002] EWCA Crim 1242; *R v Hassam* [2002] EWCA Crim 1263; *R v Marsh* [2002] EWCA Crim 1497; *R v Snooks* [2002] EWCA Crim 1104; *R v McCammon* [2002] EWCA Crim 1347; *R v Davies* [2002] EWCA Crim 1061; *R v McGhee* [2002] EWCA Crim 995; *R v Bedford* [2002] EWCA Crim 893; *R v White* [2002] EWCA Crim 899; *R v Bangura* [2002] EWCA Crim 866; *R v Wood* [2002] EWCA Crim 856; *R v Metcalf* [2002] EWCA Crim 703; *R v Devine* [2002] EWCA Crim 691; *R v Hardwick* [2002] EWCA Crim 1212; *R v Deadman* [2002] EWCA Crim 435; *R v Munn* [2002] EWCA Crim 644.

³⁶⁹ [2002] EWCA Crim 83.

³⁷⁰ [2002] EWCA Crim 536.

³⁷¹ [2002] EWCA Crim 1091.

³⁷² [2002] EWCA Crim 1076.

³⁷³ [2002] EWCA Crim 1153.

³⁷⁴ [2002] EWCA Crim 956.

³⁷⁵ [2002] EWCA Crim 1318.

³⁷⁶ [2001] 3 WLR 471.

³⁷⁷ [2002] EWCA Crim 840.

³⁷⁸ [2002] EWCA Crim 263.

These cases show that the appellant/applicant has the most chance of success when the judge makes an error and the Court decides for itself that the judge's error made the conviction unsafe. The Court in these cases appears to be focusing on the seriousness of the irregularity and in its opinion whether it has made the conviction unsafe. There were also a number of appeals where the prosecution did not wish to uphold the appeal which may have had an impact on the Court as it was not being persuaded to uphold the conviction. There was only one case in this category where the Court appeared to be clarifying the law (*Natji*). These cases, therefore, show the Court taking a less strict approach to the irregularity and granting leave or quashing the conviction on the basis of it. There did not appear to have been any consideration in these appeals as to the guilt of the applicant/appellant as this arose in other categories in the sample. Therefore, the Court was solely focussed on the seriousness of the irregularity without weighing that against the guilt of the appellant.

Those cases where the Court decided the irregularity may have had an impact on the jury will now be discussed.

The Court thinks the irregularity may have had an impact on the jury

This section sets out the grounds of appeal argued by the appellant/applicant where the Court applies an objective test and decides the irregularity may have had an impact on the jury. This is the second largest category of appeals allowed and again, shows the Court taking a less strict approach to the irregularity in overturning the conviction. This decision making process is illustrated by the following cases.

Similarly to the category above, there were judgments in this category where the appellant had not raised the issue of a fair trial, but the Court used this terminology in allowing the appeal. In *R v Bagga*,³⁷⁹ the judge had failed to properly and fairly put the defence case and the Court appeared to take a contingent approach to fairness and safety. Latham LJ stated '...it seems to us that the summing-up was deficient to an extent which we consider renders the trial process unfair. That does not necessarily equate to rendering the verdicts unsafe.'³⁸⁰ The second ground of appeal was that the judge failed to direct the jury properly on the appellant's good character. The Court agreed and allowed the appeal as 'the one thing we cannot say is that we are satisfied that it would not have had an effect on the jury.'³⁸¹ In *R v Wood*,³⁸² the judge's interruptions during the trial meant that the appellant did not have a fair trial. In

³⁷⁹ [2002] EWCA Crim 1049.

³⁸⁰ *Ibid*, para. 25.

³⁸¹ *Ibid*, para. 27.

³⁸² [2002] EWCA Crim 832.

R v A,³⁸³ the Court allowed the appeal as 'the failures to which we have referred did, in our judgment, affect the fairness of the trial and the ability of the jury to assess the evidence sufficiently and accurately.'³⁸⁴ In *R v H*,³⁸⁵ the appellant was convicted of indecent assault. The appeal was allowed as 'in our view, the fairness of the proceedings was demonstrably affected.'³⁸⁶ These cases are potentially evidence of the HRA having an impact on the Court because the Court is using the term 'fairness' to quash the conviction without the argument being made by the appellant.

But there was no mention of fairness in the other cases. The Court quashed the other convictions in the category as errors of the trial judge may all have had an impact on the jury.³⁸⁷ Similarly to the first category, these ranged from the judge interrupting to defective summing up to misdirection on the elements of the offence and to misdirection on the burden of proof, amongst others.

There were other cases in the category that did not argue errors of the trial judge. For example, the abuse of process ground was discussed and dismissed in *R v Byrne*.³⁸⁸ The appellant was convicted of manslaughter. He had been tried three years after the incident as he had fled to Ireland and had to be extradited. After he was convicted at his first trial he appealed against his conviction and it was quashed with a retrial ordered. At his second trial, the jury were unable to reach a verdict and he was then tried again and convicted. The four grounds on this appeal were that the trial should have been stayed as an abuse of process because of the delay in bringing him to trial and because it was the third trial; the evidence of a prosecution witness should not have been admitted; a no case to answer submission should have been acceded to and the judge misdirected on the *mens rea* of manslaughter. The Court dismissed the abuse of process ground as the delay was partly caused by the appellant leaving for Ireland and having to be extradited. It also dismissed the argument of it not being fair to try him a third time. The Court did agree that the evidence of the prosecution witness should not have been admitted. The witness was the victim's wife who witnessed the attack and the evidence was that the appellant had a knife and used it to stab her husband. This was not the case the prosecution advanced and Kennedy LJ stated 'as we have no idea how the jury reacted to this irrelevant, inadmissible and prejudicial evidence, we feel bound to conclude that the conviction of manslaughter

³⁸³ [2002] EWCA Crim 370.

³⁸⁴ *Ibid*, para. 33.

³⁸⁵ [2002] EWCA Crim 399.

³⁸⁶ *Ibid*, para. 26.

³⁸⁷ In *R v Fahy* [2002] EWCA Crim 525; *R v Hart* [2002] EWCA Crim 591; *R v Johnson* [2002] EWCA Crim 532; *R v Blakeney* [2002] EWCA Crim 391; *R v Round* [2002] EWCA Crim 1521; *R v Cakmak and others* [2002] EWCA Crim 500; *R v Anands* [2002] EWCA Crim 1074; *R v Khan and others* [2002] EWCA Crim 945; *R v Lang*, *R v Deadman* [2002] EWCA Crim 298; *R v Jones* [2002] EWCA Crim 287.

³⁸⁸ [2002] EWCA Crim 161.

was unsafe.³⁸⁹ In *R v Adam and others*,³⁹⁰ it was discovered after the trial that the principal prosecution witness had received cautions which were not disclosed to the defence by the prosecution. Finally, in this category, in *R v Ram*,³⁹¹ a defence witness had failed to turn up and the defence and the prosecution had taken the decision to allow a statement to be read instead. The Court quashed the convictions in both cases.

Once again, this category shows that errors by the trial judge were the most common ground. The Court weighs up the seriousness of the irregularity and decides whether it would have had an impact on the jury verdict. This category also represents the Court taking a less strict approach to the irregularity as the convictions were quashed or leave granted. The grounds of appeal were very similar to the previous category but it is not clear why the Court chose different approaches to allowing the appeals. But both categories do show that either the Court deciding the issue for itself or applying the jury impact test results in the convictions being overturned.

The cases in the sample that used the *Stirland* test to determine the appeal will now be discussed.

If the error had not occurred would the jury have inevitably convicted?

This section sets out the grounds of appeal argued by the appellant/applicant where the Court decides the conviction may or may not be unsafe or leave given on the basis of the *Stirland* test. As discussed above, the *Stirland* test was the one officially adopted by the Court when applying the proviso. This caused problems because it required the Court to place itself in the position of a reasonable jury and decide whether despite the irregularity the jury would have inevitably convicted. As the cases of *Davis*, *Rowe and Johnson*, *Francom*, *Williams* and *Fitton* discussed above showed, the *Stirland* test had survived the changes in the safety test. But there were only three cases in the sample which used the wording of this test exactly which shows it is not being used overtly too often, though the jury impact test above is a similar approach. This decision making process is illustrated by the following cases.

In *R v Conner*,³⁹² there was insufficient evidence that the appellant intended either to kill the deceased or to cause him really serious harm to leave that question to the jury. Alternatively, the judge misdirected the jury in a number of respects and that, in any event, the jury could not safely conclude that the appellant had the necessary intention. The Court agreed with Clarke LJ stating that 'in all the circumstances, we do not think

³⁸⁹ *Ibid*, para. 35.

³⁹⁰ [2002] EWCA Crim 613.

³⁹¹ [2002] EWCA Crim 372.

³⁹² [2002] EWCA Crim 471.

that a reasonable jury properly directed could safely conclude that the appellant had the relevant intention. It follows that the judge should have withdrawn the count of murder from the jury.' The Court substituted a murder conviction for a manslaughter one. This case can be contrasted with *R v West*³⁹³ where the ground of appeal was whether there was a lurking doubt relating to the issue of intention. The Court upheld the conviction in that case stating that intention was an issue of fact for the jury to determine. This is illustrative of the Court's inconsistency. But it may also be illustrative that the appellant has a far higher chance of success framing the appeal in a technicality than arguing a lurking doubt.

In *R v Edwards*,³⁹⁴ the appellant was convicted of cheating the public revenue. He was accused of using a forged tax certificate to obtain from employers of his company's services a payment in gross rather than a tax deducted basis. The main ground of appeal was that evidence of two schedules of receipts should not have been admitted due to the prejudicial effect or if they were to be admitted, the defence should have had the opportunity to deal with that evidence with the assistance of expert accounting evidence. The Court allowed the appeal and Rix LJ stated:

'it falls to this Court, therefore, to consider for itself how we would have exercised the judge's discretion in his position. We think that we would have exercised that discretion against admitting that material. On that basis we have to ask ourselves whether the conviction is unsafe. We are bound to consider it unsafe unless we are satisfied that had this evidence not been admitted the only reasonable and proper verdict would have been guilty or, to put it another way, unless a reasonable jury would have been bound to return a verdict of guilty. We are not satisfied against the background of the evidence which was put before the jury, that this test is satisfied.'³⁹⁵

The two cases above show this test being used to quash the conviction. However, the third case in this category showed the test being used to uphold the appeal. In *R v Motherwell*,³⁹⁶ the appellant was convicted of grievous bodily harm with intent. The ground of appeal was that there were a number of discrepancies in the judge's summing up namely that he did not point out the inconsistencies between the prosecution witnesses and there was no summary of the factual issues. The Court agreed that there were mistakes made in the summing up and Mr Justice Moses stated 'the second issue is whether, and notwithstanding those defects in the summing up the conviction is unsafe. That question must be determined according to whether we are sure that a jury properly directed, both as to the defence relied on and the evidence and issues in the case, would have convicted.'³⁹⁷ The appeal was

³⁹³ [2007] All ER (D) 346.

³⁹⁴ [2002] EWCA Crim 810.

³⁹⁵ *Ibid*, para. 38-39.

³⁹⁶ [2002] EWCA Crim 679

³⁹⁷ *Ibid*, para 30.

dismissed with Justice Moses stating that 'we are sure that even had the issues and factual matters properly been laid before the jury, the jury would have convicted this appellant.'³⁹⁸ The Court made reference in this case to the 'overwhelming evidence' which was 'uncontradicted.' It appears that is a factor in weighing up whether, despite the irregularity, a reasonable jury properly directed would have convicted.

With such a small number of cases it is difficult to draw any noticeable conclusions regarding this category of decision making, other than the ones discussed under the historical approach above. It may be that the Court is reluctant to use this approach because it involves the Court having to put itself in the place of the jury and come to its own assessment of the evidence minus the irregularity that has occurred. But this is really no different than the Court using the jury impact test to decide whether the irregularity may have had an impact on the jury which it chooses to use more often than the *Stirland* test. But this is at least evidence that the decision making of the proviso has survived despite it being abolished in the CAA 1995.

The cases where the irregularity occurred but there was strong prosecution evidence will now be discussed.

The irregularity did occur but there was strong prosecution evidence

This section sets out the grounds of appeal argued by the appellant/applicant where the Court decides the irregularity did occur but there was strong prosecution evidence and upholds the appeal. In these cases, the Court makes an assessment of the irregularity and weighs it against the other evidence in the case. These cases potentially show the Court taking a strict approach to the irregularity and upholding the appeal in spite of it. This decision making process is illustrated by the following cases.

It would appear from these cases that the Court is making an assessment of the guilt of the appellant. In *R v Rodger*,³⁹⁹ the appellant had been questioned without caution on the 7th and 8th April and then arrested on the 9th April. The evidence of the interview was included after an argument made to exclude it and the first ground of appeal was that the evidence should have been excluded as a serious breach of PACE. The second main argument on appeal was that the trial judge should not have allowed the trial to take place at all as he should have acceded to an application to stay the trial as an abuse of process. A further ground was based on fresh evidence which was discussed in chapter five. With regard to the evidence not being excluded, the trial judge decided this was not a 'deliberate or flagrant' breach and refused to exclude the evidence. The appeal court agreed that the trial judge had exercised his

³⁹⁸ *Ibid*, para. 33.

³⁹⁹ [2002] EWCA Crim 660.

discretion wrongly, and stated 'it therefore falls to this Court to exercise that discretion afresh.' Counsel for the appellant argued that as this was a significant and substantial breach then the evidence obtained by the breach should have been excluded. Also, that the breaches of the code had a significantly unfair effect on the fairness of the proceedings, in particular, because the Crown used answers given by the appellant during the interviews to undermine the appellant's credibility. The Court agreed with the defence argument and Dyson LJ stated:

'In our judgement the evidence of both interviews should have been excluded. The breaches were substantial and significant. The more substantial and significant a breach the more likely the evidence will be excluded, otherwise there is a danger that officers will be tempted to commit breaches of the codes, whose provisions contain important safeguards for potential defendants. Furthermore, the more substantial and significant the breach the more likely it is that it will have an adverse effect on the fairness of the proceedings.'⁴⁰⁰

It would appear here that Dyson LJ is giving effect to the integrity principle as discussed above. He went on to say that:

'In our judgment the judge should have focused on the effect on the fairness of the proceedings. The breach was significant and substantial. In our view it resulted in an unfairness to the appellant because it led to him giving answers which, had the caution been administered, he might not have given.....We are in no doubt that the evidence should have been excluded. But does the wrongful admission of the two interviews render the conviction unsafe?'⁴⁰¹

The Court reviewed both defence and prosecution arguments why the conviction should or should not be unsafe and decided on this ground that the conviction was not unsafe as:

'in our judgment, it is the cumulative effect of the points made by the Crown that made the case against the appellant so strong, even without the support afforded by the answers given in two interviews....we are in no doubt that this is a safe conviction and accordingly we reject the first ground of appeal.'⁴⁰²

It would appear that whilst the Court was upholding the principle of legitimacy by agreeing that the evidence was wrongly included, that was outweighed by the strong evidence of the defendant's guilt. A further argument was made 'that the conviction of the appellant was unlawful because it derived from a voluntary bill process which was incompatible with Article 6' which the Court rejected with Dyson LJ stating:

⁴⁰⁰ *Ibid*, para. 37.

⁴⁰¹ *Ibid*, para. 38.

⁴⁰² *Ibid*, para. 41.

‘...for the reasons that we have given earlier when considering ground 1, there was a strong prima facie case against the appellant and the judge was quite right to refuse the application to stay the proceedings.’⁴⁰³

This case illustrates the difficult balancing exercise the Court has to perform. If there is strong evidence of guilt obtained by breaching the rules, then it will be difficult for the Court to ignore that strong evidence in favour of quashing the conviction. Whilst there are cases where the irregularity will outweigh the evidence of guilt this is not an easy exercise for the Court to perform. This case is also illustrative of the difficulty of defining the value of due process. If the value is measured in the overturning of the conviction then due process does not appear to have any value here. But if the value is measured in the declaration of an error and the rhetoric around the reinforcement of the message that Dyson LJ sends that substantial and significant breaches of PACE will result in evidence being excluded then it could be argued that due process does have some value here. This will be discussed in more detail below.

Further evidence of the Court deciding on the basis of the guilt of the appellant was *R v Pryor*.⁴⁰⁴ In this case the appellant had been interviewed and then denied any involvement in a robbery. He then submitted a written statement again denying involvement but providing details of what his arguments were at trial. He was then interviewed again and made no comment interviews. The judge ruled that this was a case where a silence direction under section 34 of the CJPOA should not have been given but did not state this to the jury. The ground of appeal was that the judge should have clearly stated to the jury that a direction should not have been given in relation to the first interview. This was a case therefore, of non-direction as opposed to misdirection. The Court reviewed the decisions of *Condrón* and *Francom* in relation to the silence provisions and Article 6 and came to the conclusion that there was no unfairness and that the conviction was safe as the appellant was fortunate not to have an adverse inference direction given and ‘the evidence against the appellant in this case was in fact overwhelming.’⁴⁰⁵

This approach also appeared to be further followed in *R v Mason and others*.⁴⁰⁶ The police had been involved in a covert operation as they were having difficulties obtaining evidence in relation to those they thought were responsible. Three suspects were arrested and placed in a cell where covert taping of their conversations took place. There were a number of grounds of appeal which were that the judge was biased because he knew the Chief Constable (which the judge acknowledged); the judge should have made it known earlier that he knew the Chief Constable; the covert

⁴⁰³ *Ibid*, para. 48.

⁴⁰⁴ [2002] EWCA Crim 1112.

⁴⁰⁵ *Ibid*, para. 28.

⁴⁰⁶ [2002] EWCA Crim 385.

recordings should not have been admitted as they were contrary to sections 76 and 78 of PACE; there was a breach of the right to privacy in Article 8; there was a breach of Article 5; there was a breach of Article 6; the proceedings should have been stayed as an abuse of process; the judge misdirected on the silence provisions. The Court rejected that the judge was biased towards the prosecution. With regard to the tape recordings, the Crown invited the Court to deal with the appeal on the basis that the Human Rights Act had come into force even though the trial took place prior to this. The Court accepted this suggestion. The Court reviewed whether the tape recordings should have been admitted in light of section 76 and 78 of PACE and the provisions of the HRA. The Court discussed the cases of *R v Bailey and Smith*, *R v Ali and Hussein*, *R v Stewart* and *R v Shaukat Ali* and followed the authority that it was neither unlawful to have obtained nor unfair to have admitted the taped conversations and rejected those grounds under sections 76 and 78. The Court agreed that the covert taping was a breach of Article 8 but Lord Woolf stated that:

‘...the remedy does not have to be the exclusion of the evidence. The remedy can be the finding, which we have now made, that there has been a breach of Article 8 or it can be an award of compensation.....The infringement is...a matter which the trial judge was required to take into account when exercising his discretion under section 78 PACE.’⁴⁰⁷

The Court rejected the argument that there was a breach of Article 5 and also rejected a breach of Article 6 as ‘article 6 for the purposes of the present case does not add anything to section 78.’ With regard to the abuse of process ground, Lord Woolf stated:

‘...this argument depends on the submissions we have already dealt with so it is also rejected. The critical findings are that there was no bad faith on the part of the prosecution, nothing unlawful which was done and nothing unfair in admitting the tapes in evidence. We reject the arguments to the contrary individually and collectively.’⁴⁰⁸

With regard to the final ground, the Court appeared to agree that there were problems with the silence direction but:

‘in our judgment the judge's failure to give the conventional direction in the circumstances of this particular case does not render unsafe or unfair the conviction of any defendant upon any count. In each case the covert tapes provided overwhelming evidence against them.’⁴⁰⁹

It would appear that in this case the overriding consideration was the fact that the tapes had produced overwhelming evidence of guilt which outweighed the methods used to

⁴⁰⁷ *Ibid*, para. 67.

⁴⁰⁸ *Ibid*, para. 76.

⁴⁰⁹ *Ibid*, para. 87.

obtain the evidence. Similarly, in *R v Aladesuyi*,⁴¹⁰ the appellant was convicted of robbery. There were two grounds of appeal and the first was that the judge should have excluded identification evidence and the second was that the judge appeared to give his own opinion of the appellant's guilt in his summing up. In this case Latham LJ stated '...were it not for the fact that, in our judgment, the case against this appellant was so overwhelming that we cannot conclude that the verdict was unsafe, we would have serious misgivings about the safety of the conviction.'⁴¹¹

This approach was followed in further cases. In *R v Barrett*,⁴¹² the ground of appeal was that there had been a defective summing up in relation to similar fact evidence. In *R v Elliott*,⁴¹³ the appellant argued that the judge should not have given an adverse inference of guilt direction in relation to silence. Similarly, in *R v Scott*,⁴¹⁴ the police had been watching some premises as they suspected the appellant of committing a murder. There were two grounds of appeal. The first was that there were defects in the summing up and the second was that the judge was wrong to rule that he could not stop two co-accused from informing the jury they were not the target of police observations. The Court agreed with the second ground but upheld the appeal as 'the evidence against this appellant was extraordinarily strong.' In *R v Bromfield*,⁴¹⁵ the grounds of appeal related to misdirections on the silence provisions. In *R v C*,⁴¹⁶ the ground of appeal was that there was unfairness in the summing up. In *R v Miller*,⁴¹⁷ the grounds of appeal were that the summing up was defective and also that the judge should have left the alternative of careless driving for the jury. In *R v Denton*,⁴¹⁸ the appellant was convicted of murder. There were a number of grounds of appeal such as the Crown Prosecution Service (CPS) should have told the appellant's lawyers he was a police informant; the CPS should have told the judge he was an informant; the judge should not have granted Public Interest Immunity (PII); CPS should have told the appellant and his lawyers that certain prosecution witnesses knew he was an informant; when the press and members of the public found out about the appellant's status it should have been disclosed to the judge, the appellant and the lawyers. The Court agreed there was some substance in the last ground of appeal but the conviction was upheld as 'the evidence of guilt was overwhelming.'

The final case in this category of appeals is *R v Hanratty*.⁴¹⁹ The grounds of appeal in this case were numerous. It was discussed in chapter five in relation to fresh evidence

⁴¹⁰ [2002] EWCA Crim 1167.

⁴¹¹ *Ibid*, para. 23.

⁴¹² [2002] EWCA Crim 1372.

⁴¹³ [2002] EWCA Crim 931.

⁴¹⁴ [2002] EWCA Crim 529.

⁴¹⁵ [2002] EWCA Crim 195.

⁴¹⁶ [2002] EWCA Crim 312.

⁴¹⁷ [2002] EWCA Crim 266.

⁴¹⁸ [2002] EWCA Crim 272.

⁴¹⁹ [2002] EWCA Crim 1141.

but there were also a number of procedural irregularity grounds. There were 11 grounds of failing to disclose evidence; one ground relating to the conduct of an identification parade; one ground relating to the reliability of evidence of interviews and 4 grounds that the summing up was defective. The Court agreed that there was some substance in some of these arguments but this was countered by the evidence admitted from the prosecution of DNA evidence which was a match from the evidence of the crime and DNA taken from Hanratty's exhumed body. The conviction was upheld with Lord Woolf stating 'in our judgment for reasons which we have explained the DNA evidence establishes beyond doubt that James Hanratty was the murderer. The DNA made what was a strong case even stronger.'⁴²⁰ Lord Woolf made reference to the real issue in the case which was namely, whether James Hanratty was the killer and 'on that issue the jury came to the right answer.' The Court in this case appears to be usurping the role of the jury and concluding that Hanratty was guilty but it could be argued that that is true of all the cases in this category of decision making where the Court weighs the irregularity versus the evidence of guilt. If the evidence of guilt is strong then the Court will ignore the irregularity.

These cases seem to revert to the *Chalkley* approach by analysing safety in terms of whether the appellant committed the crime and not within the wider examination of the irregularity on its own merits. It would appear, therefore, that the Court takes a strict approach to the irregularity in these appeals. However, there is some rhetoric in these cases about rights and fairness, which of itself is useful to the fairness and safety debate, and we do get some guidance on what the Court considers an irregularity to be. So the Court does at least assess the irregularity rather than just focusing on the guilt of the appellant.

Whilst the Court could be criticised for seemingly adopting the 'dirty dog principle' and upholding the conviction because it views the appellant as guilty, it does not appear to do this without consideration of the rights of the appellant. In some of the cases it does concede that the irregularity occurred and its reluctance to allow a person who it considers to be guilty go free is understandable. Whilst the Court's role of upholding the integrity of the trial process and protecting the right of the appellant to a fair trial which is conducted according to law is important, so is protecting the public which makes the balancing acts the Court has to perform so complicated. It would appear that in the majority of these appeals the Court does appear to carry out that balancing act by agreeing that the irregularity occurred whilst at the same time deciding in favour of the guilt of the appellant. And whilst Ormerod and Taylor may criticise this approach for giving weight to 'pragmatism' over 'principle,' the Court is at least protecting the public

⁴²⁰ *Ibid*, para. 211.

from potentially dangerous criminals going free which many would argue, should be its role and function.

The cases where the irregularity was too minor to have an impact on the safety of the conviction will now be explored.

Minor irregularity which did not impact on the safety of the conviction

This section sets out the grounds of appeal argued by the appellant/applicant where the Court decides the irregularity did occur but it was minor and did not impact on the safety of the conviction. These cases also potentially show the Court taking a strict approach to procedural irregularities as the conviction is upheld. This decision making process is illustrated by the following cases.

There was one case in this category which discussed the fairness of the trial. In *R v Halsall*,⁴²¹ the ground of appeal was that the appellant did not have a fair trial. This was based on the fact that some of the defence witnesses had been given sight of prosecution witnesses' statements by the appellant's solicitors. In summing up the judge made reference to this and that the defence witnesses may have been tainted by seeing the statements. The appellant's counsel on appeal argued that the jury would have been influenced by the judge's disapproval that the defence witnesses had seen the statements. However, this was dismissed by the Court who stated that the defence witnesses seeing the statements formed a small part in the trial and whilst it would have been preferable for the judge to use the word 'affected' rather than 'tainted' the conviction was safe.

Once again, a large number of the grounds in this category related to errors of the trial judge. In *R v Roe*,⁴²² the judge intervened when an expert was giving evidence. The Court agreed there was 'some force' in these arguments but they did not undermine the safety of the conviction. In *R v Jones*,⁴²³ there were a number of counts and the grounds of appeal were that the judge did not put the defence case fairly in the summing up. The Court had some sympathy with the argument but it had no doubt about the safety of the conviction. In *R v Wilson*,⁴²⁴ the ground of appeal was that the judge did not outline properly the prosecution case in relation to a video which was played to the jury. The Court agreed that it would have been preferable for the judge to identify for the benefit of the jury the precise ambit of the prosecution case however it did not agree that this had made the conviction unsafe. In *R v M*,⁴²⁵ there were a number of grounds of appeal such

⁴²¹ [2002] EWCA Crim 1450.

⁴²² [2002] EWCA Crim 1627.

⁴²³ [2002] EWCA Crim 1264.

⁴²⁴ [2002] EWCA Crim 1499.

⁴²⁵ [2002] EWCA Crim 1192.

as the judge had misdirected on the medical evidence; the judge misdirected on the issue of collusion between the complainants and the judge failed to point out to the jury in the summing up the fact that one of the complainants had changed her story. The Court agreed that the final point was a 'glaring omission' but this did not render the conviction unsafe. In *R v Fleckney, R v Smith*,⁴²⁶ the police had bugged Fleckney's house with a covert listening device. The first ground was that the evidence obtained from the listening device should have been excluded and there were also complaints made about the hearing the judge conducted at trial when deciding to admit the evidence which had been conducted without the presence of the defence because of public interest factors. The Court dismissed this ground. The second ground was that the prosecution should not have put forward a police officer, DC Clark, as a witness of truth because he was later convicted of corruption. He was also having a relationship with Fleckney. The Court accepted that the judge ought to have given the jury some guidance as to how to approach Clark's evidence but its overall view was that it had no doubt about the safety of the convictions. In *R v Sharp*,⁴²⁷ the first ground was that the judge had failed to give the proper direction in relation to circumstantial evidence. The Court agreed it was deficient but disagreed that the summing up as a whole failed to direct the jury properly on circumstantial evidence. The other grounds related to criticisms that the judge had not properly put the prosecution case in summing up. In the Court's view 'it is undoubtedly the case that some of them are justified' but decided the verdict was safe. In *R v Quarsi*,⁴²⁸ the appellant raised the defence of duress at trial. The ground of appeal was that the judge had misdirected on duress. The Court accepted that parts of the judge's summing up could have been better and 'the question is whether the verdict of this jury was unsafe in the absence of such a direction.' It reached the conclusion that the conviction was safe. In *R v Gregory*,⁴²⁹ there had been an alternative count of wounding with intent and it was decided by the appeal court that the judge's directions of wounding with intent were wrong but the conviction at that point was safe because the appellant was convicted of unlawful wounding not of wounding with intent. There were further grounds which were that the judge should have reminded the jury in the summing up that two of the prosecution witnesses had had cautions. The Court agreed that it would have been better if the judge had done so but did not view this as a major point because the jury were aware of the cautions. The final ground was that two members of the jury had to be discharged as they were unable to return to the court on the following Monday and the rest of the jurors decided in a very short space of time that the appellant was guilty. The Court dismissed that ground and the appeal. In *R v Simms, R v Ogle*⁴³⁰ the grounds of appeal for Simms were that the judge erred in the summing up by suggesting Sims was involved in count 2. The Court accepted that was

⁴²⁶ [2002] EWCA Crim 992.

⁴²⁷ [2002] EWCA Crim 922.

⁴²⁸ [2002] EWCA Crim 522.

⁴²⁹ [2002] EWCA Crim 204.

⁴³⁰ [2002] EWCA Crim 149.

an error as count 2 solely related to Ogle, but did not accept that 'this slip of the tongue rendered a subsequent conviction unsafe.' The applicant Ogle had argued that the judge had incorrectly allowed evidence to be admitted concerning a murder he had originally been charged with. Also evidence of a witness should not have been admitted. The Court dismissed these grounds and the applications for leave were refused.

The above cases show that once again, the predominant ground of appeal for this category of decision making is errors of the trial judge. But there was one case in this category which related to non-disclosure of evidence. In *R v M*,⁴³¹ the appellant argued that a report from the complainant's doctor was only disclosed to the defence after the trial had concluded. If the report had been disclosed prior to the trial it could have been used to contradict evidence from a forensic medical examiner given in court. The Court agreed, and the prosecution agreed, that the report should have been disclosed but the Court was not persuaded the conviction was unsafe because the appellant had not shown what difference the report would have made.

This category of decision making would appear to show the Court taking both a strict and less strict approach to the procedural irregularity. It is less strict in the sense that the Court agrees that the irregularity had occurred but strict in the sense that the appeal was upheld. This category of decision making appears to be very similar to the one where the Court views the irregularity to have occurred but there is strong prosecution evidence. If the Court is viewing that the conviction is safe despite the irregularity then it is presumably taking a view on the evidence of guilt of the appellant. But there was no expressed reference in these cases to the strength of the prosecution case.

As with all the other categories so far, the majority of appeals were based on the errors of the trial judge with only one appeal based on non-disclosure of evidence so once again, errors of the trial judge is the predominant ground. The grounds in this category are very similar to those argued in the appeals above where the conviction was overturned, so it is not overly clear what the differences are between them other than, perhaps, the strength of evidence against the appellant. If the Court views the irregularity occurred then it clearly either quashes the conviction because it views the conviction unsafe, applies the jury impact test and concludes the conviction is unsafe, upholds the appeal because of the strength of the prosecution case or concludes the irregularity is too minor to impact on the safety of the conviction. The grounds of appeal that resulted in the conviction being upheld and the conviction being quashed seem very similar and whilst the strength of the prosecution case will vary in each case, the differences between the cases in the other categories are harder to determine.

⁴³¹ [2002] EWCA Crim 715.

The final, and largest, category of appeals will now be explored which is where the Court decides the irregularity did not occur.

The Court thinks the irregularity did not occur

This section sets out the grounds of appeal argued by the appellant/applicant where the Court decides the irregularity did not occur. In these cases the Court makes an assessment of the irregularity itself and disagrees that there was an irregularity at all. This was, by far, the largest category of appeals. The Court is taking a strict approach to the procedural irregularity by concluding that it did not occur. There were a number of cases in this category of appeal that either raised human rights grounds or raised abuse of process grounds or both. These will now be analysed first in order to assess any possible impact the HRA may have had and the Court's approach to these appeals.

The human rights grounds raised a number of different issues. For example, there were cases that argued that the Misuse of Drugs Act was incompatible with Article 8 which the Court disagreed with.⁴³² There were also arguments that appellants who represented themselves at trial did not get a fair trial.⁴³³ There was a further Article 8 argument made in *R v McLeod*,⁴³⁴ where a covert listening device was placed in the back of a police van. The trial judge followed *R v Mason*⁴³⁵ and decided whilst it did breach Article 8 it should not have been excluded as it did not adversely effect the fairness of the proceedings. The appeal court held the judge was correct in not excluding the evidence. The reasons given by Waller LJ were that there was a probable breach of Article 8 but it was fair to admit the evidence because authority for the device was granted by using the proper guidelines and there was no illegality in the gathering of the evidence as the appellant was not tricked into making incriminating remarks. This reinforces that breaches of Article 8 do not necessarily result in convictions being quashed.

There were cases where both human rights and abuse of process arguments were made. In *R v Mould*,⁴³⁶ both were argued because a can at the scene of the crime had been examined for DNA and then discarded. The defence argued they should have had the right to examine the can. The application was refused as the defence had had the opportunity to dispute the findings from the can. Similarly, in *R v Elliot*, *R v Clarkson*,⁴³⁷ the drugs which were the evidence in the case had been destroyed and the defence had not had the opportunity to have them tested. The Court dismissed the appeal as they could find nothing in the argument that there was a breach of Article 6 (or there had been an abuse of process).

⁴³² See *R v Morgan* [2002] EWCA Crim 721; *R v Ham* [2002] EWCA Crim 1353.

⁴³³ See *R v Lockwood* [2002] EWCA Crim 60; *R v Rowe* [2002] EWCA Crim 203.

⁴³⁴ [2002] EWCA Crim 989.

⁴³⁵ See above, n.406.

⁴³⁶ [2002] EWCA Crim 349.

⁴³⁷ [2002] EWCA Crim 1199.

There were also other cases which illustrate this approach. In *R v Henrick*,⁴³⁸ the appellant was convicted of dangerous driving. The grounds of appeal were that the judge was biased against the appellant in the summing up which was a breach of Article 6. The Court applied the 'fair-minded and informed observer test' from *Magill and Porter*⁴³⁹ and concluded the conviction was safe. In *R v Sood*,⁴⁴⁰ the applicant cited his own grounds and one of these was that the applicant did not get a fair trial because one of the jurors was asleep. The Court was satisfied that if this was the case the judge would have been able to deal with it and the application to appeal was refused. In *R v Holdsworth*,⁴⁴¹ the applicant was convicted of indecent assault. The applicant had been identified by his car and close to the scene was a shop that had a video tape running which showed the inside of the shop. The police did not seize the tape because it did not show the outside of the shop and the applicant argued he did not get a fair trial as the police were in dereliction of their duty by not seizing the tape. The Court refused the application. In *R v Rees*,⁴⁴² the appellant made what the Court called an 'ambitious submission' about Article 6. He was convicted of indecent assault and there was some CCTV evidence from a shop. There were moments when the assault was not captured on camera and in summing up, the judge had suggested why this would be. The appellant argued that the judge's suggestions were a breach of Article 6 because under Article 6(3)(b) the accused has a fundamental minimum right to have adequate time and facilities for the preparation of the defence. The appellant argued that the judge's suggestion to the jury, which had not been raised by the prosecution, had deprived the defence of adequate time to prepare the appellant's defence. But the Court rejected this argument as there was nothing new in what the judge was suggesting. In *R v Hammond*, *R v McIntosh*, *R v Gray*,⁴⁴³ the applicants were convicted of conspiracy to defraud. A prosecution witness was unable to attend and the judge decided to admit her witness statement under section 23 of the Criminal Justice Act 1988 after deciding that the requirements under section 26 had been satisfied. It was argued on appeal that this was contrary to Article 6(3)(d) which states that everyone charged with a criminal offence has the right 'to examine or have examined witnesses against him.' The Court referred to previous judgments where it was held that the provisions in section 26 where the Court had to grant leave for the evidence to be admitted was compliant with the convention. The applications were refused.

⁴³⁸ [2002] EWCA Crim 308.

⁴³⁹ [2001] UKHL 67. The test is '...the court had first to ascertain all the circumstances which had a bearing on the suggestion that the judge was biased and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'

⁴⁴⁰ [2002] EWCA Crim 639.

⁴⁴¹ [2002] EWCA Crim 643.

⁴⁴² [2002] EWCA Crim 897.

⁴⁴³ [2002] EWCA Crim 1423.

A detailed human rights argument was made in *R v Perrin*.⁴⁴⁴ The appellant was convicted of publishing an obscene article on the internet contrary to the Obscene Publications Act. He argued that the offence contradicted Article 10 which is freedom of expression. He argued that under Article 10(2) the offence was not sufficiently 'prescribed by law' because the 'statutory definition of obscenity lacks sufficient precision and the restriction which the statute imposes is not shown to be necessary in a democratic society.' The Court decided that the offence did fall within the scope of Article 10(2) as 'for a legitimate purpose the offence was prescribed by law.' The appeal was dismissed. A similar argument was made in *R v Cotter and others*.⁴⁴⁵ The case concerned whether the offence of perverting the course of justice complied with Article 7 of the ECHR. The appellants were all involved in a conspiracy to obtain money from the press as one of them was the partner of an athlete, Ashia Hanson. It was argued on appeal that the elements of the offence were so uncertain they infringed Article 7 which requires any criminal charge to be clearly defined by law. The Court reviewed the case law of the offence and concluded it was compatible and the appeal was dismissed.

A similar definition of the law was provided by *R v Kearns*.⁴⁴⁶ The appeal concerned whether section 353(3)(a) of the Insolvency Act 1986 – failing to account for the loss of a substantial part of property when required to do so by the official receiver – was compatible with Article 6. The appellant argued that the Act forced the bankrupt to give information to the official receiver and if he failed to do so without reasonable excuse he committed an offence. This meant the section was contrary to the right to remain silent and also the right not to incriminate himself. The appellant had pled guilty at trial. The Court reviewed the Strasbourg and UK cases and came to some conclusions in relation to the right to silence, the right not to incriminate oneself and Article 6. These were that Article 6 is concerned with the fairness of a judicial trial where there is an 'adjudication.' It is not concerned with extra-judicial enquiries as such; the rights to silence and not to incriminate oneself are implicit in Article 6; the rights to silence and not to incriminate oneself are not absolute, but can be qualified and restricted. A law which qualifies or restricts those rights is compatible with Article 6 if there is an identifiable social or economic problem that the law is intended to deal with and the qualification or restriction on the rights is proportionate to the problem under consideration. The Court dismissed the appeal holding that 'in our view the regime of section 354(3)(a) is a proportionate legislative response to the problem of administering and investigating bankrupt estates.' A similar declaration was required in *R v Daniel*,⁴⁴⁷ in terms of whether the statutory defence in section 352 of the same Act imposed a legal or evidential burden. The Court decided it was a persuasive burden and upheld the appeal.

⁴⁴⁴ [2002] EWCA Crim 747.

⁴⁴⁵ [2002] EWCA Crim 1033.

⁴⁴⁶ [2002] EWCA Crim 748.

⁴⁴⁷ [2002] EWCA Crim 959.

The contingent approach to fairness and safety appeared to be taken in *R v Skuse*.⁴⁴⁸ The Court was asked to determine whether a conviction was unsafe on the basis that a naval court martial is incompatible with Article 6 because the judge is appointed from barristers who are also serving officers. The Court reviewed the remedies available to it if it had found there had been a breach of Article 6. Rix LJ stated 'we would tentatively express the view that in a case such as this, had we held that there had been a breach of Article 6(1), we consider that we would not have been bound to hold the conviction to be unsafe.'⁴⁴⁹

The issue of delay arose in *R v James*.⁴⁵⁰ The appellant was convicted of conspiracy to defraud. The appellant had been tried and the jury were unable to reach a verdict. The judge ruled he should be retried. He was retried and then convicted. He argued on appeal that the delay in bringing his prosecution to a conclusion meant there was a breach of Article 6(1) in as much as it requires a 'criminal charge' to be determined at a public hearing 'within a reasonable time.' The Court reviewed the case law and came to the decision that the sentence James had received was a reflection of the difficulties with this case where there were a number of defendants tried at different times. And Rix LJ stated 'we think that even if there had been any breach of James' rights under Article 6(1), a sufficient and appropriate remedy was provided. It could not be said that his conviction should be regarded as unsafe by reason of any such breach.'⁴⁵¹ This appears to be saying that the appropriate remedy for the breach was the sentence given which is evidence that the quashing of the conviction is not the Court's only remedy.

The above cases show that the HRA has given appellants/applicants new arguments to bring to appeal and the Court has had to adjust to those new arguments in line with the Strasbourg jurisprudence. In that sense it could be argued that the HRA has had an impact on the Court's decision making. This is counterbalanced though by the fact that none of these convictions were overturned or applications for leave granted which is evidence that whilst the Court is hearing more HRA-type arguments, it is not being particularly receptive to them in the sense of overturning convictions. This is obviously disadvantageous to the appellant who loses the appeal but there is some value in these cases in developing points of legal principle that may be useful for other appellants and the jurisprudence of the Court generally. This can also be analysed in terms of the abuse of process arguments in the sample which will now be discussed.

⁴⁴⁸ [2002] EWCA Crim 991.

⁴⁴⁹ *Ibid*, para. 62.

⁴⁵⁰ [2002] EWCA Crim 1119.

⁴⁵¹ *Ibid*, para. 79.

In *R v Lamer*,⁴⁵² the applicant was convicted of intimidating a witness. One of the applicant's own grounds was that there had been an abuse of process. This referred to the fact that the defence had not been provided with proper documents by the prosecution. The Court refused the application as there was nothing to justify the conviction being unsafe. There appeared to be similarities to the *Mullen*⁴⁵³ case in *R v Hooper*.⁴⁵⁴ The appellant was convicted of conspiracy to import drugs. He argued duress at the trial. On appeal he argued that the judge should have dismissed the trial as an abuse of process as one of the co-conspirators, Michael, had been known to a police officer, Carpenter, as he was a police informant. The police were using this person, Michael, to catch a more prolific drug dealer, Green. The prosecution had argued that Carpenter was acting corruptly and outside his powers as a police officer. This meant there was no official involvement by the police in Michael's activities. The appellant had had no dealings with the police himself. There were two strands to the abuse argument, the first was that it was entrapment as Hooper had been recruited by Michael acting as a police informer with the agreement of Carpenter. The second abuse ground was that there were serious failings of procedure and propriety in the handling of Michael as a police informer and that it should have been known that he was involved in drug dealing and those activities should not have received any support. It was said that it was an affront to the public conscience for a prosecution to be brought in respect of offences that were connected with Michael's activities which would not have been committed if the police had properly intervened to stop those activities.

With regard to entrapment, the Court reviewed the authority of *R v Looseley*⁴⁵⁵ and was guided, after some discussion, by Lord Hoffman's statement that 'entrapment occurs when an agent of the state – usually a law enforcement officer or a controlled informer – causes someone to commit an offence in order he should be prosecuted.' The Court decided that the entrapment ground failed because Hooper was not entrapped or lured into committing the offences in order that he should be prosecuted. With regard to the abuse ground, the Court also reviewed the law, in particular the balancing exercise as stated by Lord Steyn in *Latif*.⁴⁵⁶ The Court decided there was no abuse of process on the basis that any abuse complained of did not involve Hooper directly and he was not enticed as he continued to deal in large amounts of drugs over a long period of time. Buxton LJ stated that:

'...it is not an affront to public conscience for Mr Hooper to be prosecuted. Rather, it would be a serious, we would say a gross, affront to the public conscience if the arguments advanced by Mr Hooper even taken at their height and accepting everything that he contends were permitted to prevent Mr

⁴⁵² [2002] EWCA Crim 597.

⁴⁵³ See above, n.334.

⁴⁵⁴ [2002] EWCA Crim 621.

⁴⁵⁵ [2001] UKHL 53.

⁴⁵⁶ See above, n.336.

Hooper's conviction of an enormously serious offence of which he was convicted on overwhelming evidence.⁴⁵⁷

There are some similarities here with the case of *Mullen* in that Hooper had also argued duress on appeal so there was no question he had committed the acts he was alleged to have done. Mullen was also convicted of a serious offence on overwhelming evidence (he too argued duress) but clearly the appeal court in Mullen quashed the conviction. It would appear that the weighing exercise as outlined by Lord Steyn in *Latif* came down in favour of Mullen because of the seriousness of the abuse, which involved the British Government, and the direct link between the abuse and Mullen's prosecution on the basis of it. Whereas with Hooper the Court is deciding in favour of the seriousness of the offence and the overwhelming evidence and against the abuse by saying that the abuse did not directly affect Hooper and he was not enticed by it to commit a crime. So it would appear in Mullen the Court took a less strict approach to the procedural irregularity in quashing the conviction whereas in Hooper it took a strict approach to the procedural irregularity on the basis of the evidence.

A similar case was that of *R v Akiner, R v Mustafa*.⁴⁵⁸ They were both convicted of being part of the importation of heroin. The applicants had argued the trial should have been stayed as an abuse of process on account of the late disclosure of documents and also on the first day of the trial, the prosecution had applied to have some documents subject to Public Interest Immunity (PII) to protect other drug operations. The applicants argued at trial that the prosecution were acting in bad faith, or at least with gross incompetence, in making the PII application. On appeal they decided the prosecution did not act in bad faith but they did consider them to be incompetent. The trial judge rejected these arguments as did the appeal court. The Court held that the applicants did not suffer any prejudice by the decisions of the prosecution and the applications were refused. In *R v King*,⁴⁵⁹ the appellant was convicted of possessing crack cocaine with intent to supply. The drugs had been obtained from a car, the key of which had been discovered during a raid of the appellant's home. One of the police officers had testified that although the police had entered the property at 6.00am, he had not had access to the bedroom where the key was found until 8.55am as the bedroom door had been closed and the appellant and two police officers were inside the room. It was argued at trial that the trial should have been stayed as an abuse of process because the defence were precluded from cross examining the police officers who had been in the room with the appellant in case it was revealed that the appellant was an informant. This was supposedly too prejudicial to the defence. The judge declined and it was argued on appeal that the trial should have been stayed. The Court concluded there was nothing in this point and the appeal was dismissed.

⁴⁵⁷ See above, n. 454 para. 42.

⁴⁵⁸ [2002] EWCA Crim 957.

⁴⁵⁹ [2002] EWCA Crim 898.

A further abuse of process ground was argued in *R v Izzigil*, *R v Kaan* and *R v Onbasi*.⁴⁶⁰ The appellant had argued at the trial that there had been an abuse of process on the basis that the CPS had offered to drop the conspiracy charge and replace it with a charge of being concerned in the supply of heroin. The CPS had then decided to proceed with the conspiracy charge. The judge had accepted that the undertaking by the CPS had occurred but rejected that there had been an abuse of process. The appeal court agreed and upheld the appeal as there was no prejudice.

An important legal principle for appellants was decided in the case of *R v Thomas*.⁴⁶¹ The appellant had been convicted of murder and the first conviction was quashed on appeal and a retrial ordered. He then appealed the second conviction which was upheld. He was now appealing for the third time as a result of a reference by the CCRC. He was arguing on the second appeal that his conviction should be quashed as his conviction was quashed on the first appeal because evidence of child witnesses had been excluded from the trial which would have assisted his case. That same evidence was not in the retrial so he was essentially going back to the appeal court with the same argument.

The Court considered that the power of the CCRC to refer cases where there were exceptional circumstances without new evidence or argument extended the power of the Court in exceptional circumstances to depart from its previous decision where there was no new evidence or argument. Auld LJ suggested that exceptional circumstances could be where there had been some form of jurisprudential 'drift' or there may be others arising out of possible tension between the statutory criteria for the safety of a conviction and the ECHR concept of a fair trial. But in this case he concluded this point by saying '...there is clearly nothing exceptional about the circumstances relating to this ground of appeal, whether by necessary implication from section 13(2) of the 1995 Act [the CCRC reference] or under the Court's general statutory jurisdiction, that would enable this Court to overrule the correct decision of the second Court of Appeal on the same facts and essentially the same argument.'⁴⁶²

It would appear in this case that Auld LJ is developing a point of principle, which is that if there is tension between 'safety' and 'unfairness' then this would enable the Court of Appeal to depart from a previous decision where there was no new evidence or argument. This would be an important development arising out of the HRA for appellants even if, as Auld LJ stated, 'the Court should in any such cases be very slow to differ from its previous judgment.' The problem here for the appellant was that this point of

⁴⁶⁰ [2002] EWCA Crim 925.

⁴⁶¹ [2002] EWCA Crim 941.

⁴⁶² *Ibid*, para. 76.

legal principle did not result in the conviction being quashed. This shows the difficulty of evaluating these appeals in terms of the approach the Court is taking after the HRA. But the benefit for other appellants may be seen in cases such as *R v Mills and another*⁴⁶³ where this case was discussed, again by Auld LJ, and the conviction was quashed after previous appeals were upheld by the Court of Appeal and the House of Lords.

An abuse of process argument was also raised in *R v Sahdev*.⁴⁶⁴ The appellant was convicted of a racially aggravated assault. Police officers had gone to stop him coming out of an underground station and he had refused to stop. He had shouted racial abuse and spat at two officers whilst waving a Stanley knife. He claimed he had acted in self defence. There had been an application to stay the trial after the prosecution had seized video tapes from cameras in the area but it was discovered there were other cameras that the police did not know about. The Court dismissed the appeal as it was satisfied the appellant had had a fair trial and that the convictions were safe. With regard to the abuse of process, Mr Justice Goldring stated 'in all the circumstances, we have come to the conclusion that submissions regarding abuse of process in this case cannot be sustained as they cannot in very many cases.'⁴⁶⁵ This would suggest that the Court rarely overturns the appeal on the basis of an abuse which is borne out by the 2002 sample. In *R v Gilmour*,⁴⁶⁶ the applicant was convicted of indecent assault and gross indecency with a child. The ground of appeal was that the trial should have been stayed as an abuse of process as a result of the late disclosure by the prosecution. The Court refused this ground because defence counsel had not applied for an adjournment and had made all the points worthy of consideration by the jury. The Court stated it may have taken a different view if the defence had applied for an adjournment and it had been refused.

The final abuse of process case is *R v Mirza*.⁴⁶⁷ The appellant was charged with indecent assault. The appellant argued there had been a breach of Article 6 because a juror had sent a note to the judge stating that members of the jury thought the use of an interpreter by the appellant was a devious ploy. So the jury had reached a verdict not solely on the basis of the evidence but because of suspicions about the appellant's need for an interpreter and they were influenced by prejudice. The Court dismissed the appeal as it said it was bound by the decision of *R v Quereshi*⁴⁶⁸ and section 8 of the Contempt of Court Act prevented it admitting into evidence the terms of the letter written.

⁴⁶³ [2003] EWCA Crim 1753.

⁴⁶⁴ [2002] EWCA Crim 1064.

⁴⁶⁵ *Ibid*, para. 25.

⁴⁶⁶ [2002] EWCA Crim 1355.

⁴⁶⁷ [2002] EWCA Crim 1235.

⁴⁶⁸ [2002] 1 Cr App R 433. This case eventually went to the House of Lords where it was held that the secrecy of jury deliberations did comply with Article 6. See *R v O'Connor*, *R v Mirza* [2004] UKHL 2. This House of Lords judgment also encompassed another case in the sample, *R v Rollock* [2002] EWCA Crim 1236 which dealt with the same issues as *R v Mirza* and the application was refused.

These cases show that the evidence is contradictory as to whether the HRA has had an effect on the Court's decision making. Whilst the abuse of process doctrine was well established prior to the enactment of the HRA, it is a ground of appeal that particularly lends itself to HRA-type arguments because of Article 6. It would appear from Mr Justice Goldring's comments in *Sahdev* that the Court is not particularly receptive to the arguments. This is illustrated by the fact that none of the convictions were overturned as this category of appeals demonstrates the Court deciding the irregularity did not occur, though cases such as *Thomas* show that these cases are able to produce useful legal points of principle for appellants even if the conviction is not overturned.

The other appeals in this category contained very similar grounds to the other categories. The main grouping of appeals was, once again, errors of the trial judge but the other appeals included inconsistent or perverse verdicts;⁴⁶⁹ there was a biased tribunal because members of the jury were known to the appellant or connected to the police;⁴⁷⁰ there were lawyer errors;⁴⁷¹ there was non-disclosure of evidence,⁴⁷² there was no case to answer,⁴⁷³ and the appellant was pressurised into pleading guilty.⁴⁷⁴ This is consistent with the other categories where the errors of the trial judge also consisted of the largest number of appeals. There were also a small number of appeals which raised grounds that did not belong to a particular grouping but were particular to the individual case. Some of these were own grounds appeals where the applicant/appellant had drafted his/her own grounds of appeal which were not capable of being grouped with others as they did not conform to general appeal grounds.

The errors of the trial judge made up the largest group and were basically split into three groupings. These were the evidence was wrongly included or excluded, there were misdirections of law, and the judge made errors in the summing up. These will now be briefly analysed to provide a picture of the main grounds of appeal which the Court dismissed or refused.

⁴⁶⁹ See, for example, *R v Davis* [2002] EWCA Crim 323; *R v James* [2002] EWCA Crim 1119; *R v Franks* [2002] EWCA Crim 51; *R v G* [2002] EWCA Crim 224; *R v Rees* [2002] EWCA Crim 265; *R v Ashmore* [2002] EWCA Crim 726; *R v C* [2002] EWCA Crim 1299; *R v Phillips* [2002] EWCA Crim 1198; *R v Sood* [2002] EWCA Crim 639; *R v Deacon*, *R v Seymour* [2002] EWCA Crim 1490; *R v Rawson* [2002] EWCA Crim 1044.

⁴⁷⁰ See, for example, *R v B* [2002] EWCA Crim 543; *R v Bowden* [2002] EWCA Crim 564; *R v Blades* [2002] EWCA Crim 1052; *R v Hamond* [2002] EWCA Crim 1423.

⁴⁷¹ See, for example, *R v Stubbs* [2002] EWCA Crim 1307; *R v Fiatu* [2002] EWCA Crim 1469; *R v Ende* [2002] EWCA Crim 714; *R v Abanah* [2002] EWCA Crim 951; *R v Phillips* [2002] EWCA Crim 1198; *R v Lamer* [2002] EWCA Crim 597; *R v Sodha* [2002] EWCA Crim 944; *R v Henriksen* [2002] EWCA Crim 1373; *R v Garner* [2002] EWCA Crim 1166; *R v Tomlinson* [2002] EWCA Crim 304.

⁴⁷² *R v Blenkinsop* [2002] EWCA Crim 855; *R v Allan* [2002] EWCA Crim 1055; *R v Osmanioglu* [2002] EWCA Crim 930; *R v N* [2002] EWCA Crim 1595; *R v Cleeland* [2002] EWCA Crim 293; *R v James* [2002] EWCA Crim 1119.

⁴⁷³ *R v Rawson* [2002] EWCA Crim 1044; *R v Amarasinghe* [2002] EWCA Crim 588; *R v Irvine* [2002] EWCA Crim 827; *R v Roye* [2002] EWCA Crim 1005; *R v Armitage* [2002] EWCA Crim 1224; *R v Marsh* [2002] EWCA Crim 137; *R v Morris* [2002] EWCA Crim 158; *R v Arnell-Smith* [2002] EWCA Crim 390; *R v Killian* [2002] EWCA Crim 404; *R v Johnson* [2002] EWCA Crim 595; *R v Smith* [2002] EWCA Crim 683; *R v Smith* [2002] EWCA Crim 759; *R v Matthews and Alleyne* [2002] EWCA Crim 741; *R v Rao* [2002] EWCA Crim 781; *R v Brownlie* [2002] EWCA Crim 921; *R v Cairns* [2002] EWCA Crim 533; *R v Dodds* [2002] EWCA Crim 239; *R v Dutton* [2002] EWCA Crim 56; *R v Jenkins* [2002] EWCA Crim 749; *R v Gelderbloem* [2002] EWCA Crim 926.

⁴⁷⁴ See, for example, *R v McVey* [2002] EWCA Crim 1107; *R v Willington* [2002] EWCA Crim 40.

There were a number of grounds where it was argued that the trial judge should have excluded evidence. These included a CCTV video where it was argued it would be prejudicial for the appellant;⁴⁷⁵ evidence of similar fact;⁴⁷⁶ evidence of identification of photographs of the appellant by four police officers;⁴⁷⁷ identification evidence which had been obtained in breach of PACE;⁴⁷⁸ a previous conviction of having a false passport;⁴⁷⁹ a police interview;⁴⁸⁰ an interview with customs;⁴⁸¹ a complainant's video given as evidence in chief;⁴⁸² a telephone conversation in breach of Code C of PACE;⁴⁸³ birthday cards to rebut the defence of duress;⁴⁸⁴ the victim's credit card found in the appellant's shoe;⁴⁸⁵ evidence of previous trips to London (drug trafficking);⁴⁸⁶ scientific evidence of contamination of bank notes by drugs;⁴⁸⁷ evidence of a conversation between appellant and police officers;⁴⁸⁸ evidence of drug paraphernalia found in the applicant's home;⁴⁸⁹ evidence of an identification parade;⁴⁹⁰ interview with the police that took place after the appellant should have been charged contrary to Code C of PACE.⁴⁹¹ These are all illustrations of the types of evidence that were argued should have been excluded where the Court decided the judges were correct in not excluding them.

Alternatively, there were also a number of cases where it was argued that the evidence should not have been allowed to be included such as evidence of the applicant giving a false name on arrest;⁴⁹² evidence of a fight between the appellant and the victim;⁴⁹³ similar fact evidence;⁴⁹⁴ identification evidence;⁴⁹⁵ a filofax containing lists of drugs;⁴⁹⁶ a list of names and addresses found in a car said to be drug customers;⁴⁹⁷ testimony from a witness said to be prejudicial;⁴⁹⁸ taped telephone conversations;⁴⁹⁹ evidence of previous violent behaviour;⁵⁰⁰ and evidence of computer access in benefit fraud.⁵⁰¹ There were also a number of cases where it was argued the evidence should have been included such as evidence of a wife's bad character who had accused him of robbery

⁴⁷⁵ *R v Briggs* [2002] EWCA Crim 612.

⁴⁷⁶ *R v Ingram* [2002] EWCA Crim 512.

⁴⁷⁷ *R v Hardy* [2002] EWCA Crim 296.

⁴⁷⁸ *R v Nolan* [2002] EWCA Crim 464.

⁴⁷⁹ *R v Del Castillo Vega* [2002] EWCA Crim 04.

⁴⁸⁰ *R v Thurlwell* [2002] EWCA Crim 386.

⁴⁸¹ *R v McKee* [2002] EWCA Crim 1498.

⁴⁸² *R v Deacon, R v Seymour* [2002] EWCA Crim 1460.

⁴⁸³ *R v Doyle* [2002] EWCA Crim 1176.

⁴⁸⁴ *R v Snowden* [2002] EWCA Crim 923.

⁴⁸⁵ *R v Gelderbloem* [2002] EWCA Crim 926.

⁴⁸⁶ *R v Linder* [2002] EWCA Crim 1067.

⁴⁸⁷ *R v Healey* [2002] EWCA Crim 695.

⁴⁸⁸ *R v Jenkins and others* [2002] EWCA Crim 749. See also *R v Singleton* [2002] EWCA Crim 459.

⁴⁸⁹ *R v Dutton* [2002] EWCA Crim 56.

⁴⁹⁰ *R v Marrin* [2002] EWCA Crim 251.

⁴⁹¹ *R v Samuels* [2002] EWCA Crim 309.

⁴⁹² *R v Hatton* [2002] EWCA Crim 700.

⁴⁹³ *R v Cleeland* [2002] EWCA Crim 293.

⁴⁹⁴ *R v Willemse* [2002] EWCA Crim 1241. See also *R v Martin* [2002] EWCA Crim 1214.

⁴⁹⁵ *R v McIntosh* [2002] EWCA Crim 1173.

⁴⁹⁶ *R v Vanherck* [2002] EWCA Crim 906.

⁴⁹⁷ *R v Naylor* [2002] EWCA Crim 857.

⁴⁹⁸ *R v Wharton* [2002] EWCA Crim 630.

⁴⁹⁹ *R v Goodman* [2002] EWCA Crim 903.

⁵⁰⁰ *R v Dodds* [2002] EWCA Crim 239.

⁵⁰¹ *R v Naiwo* [2002] EWCA Crim 398.

and indecent assault;⁵⁰² and the full indictment to which a co-accused had pleaded guilty.⁵⁰³

These cases all required the Court to make an assessment of the evidence and decide whether it should have been included or excluded and whether the decision made to include it or not exclude it made the conviction unsafe. These appeals generally require the Court to decide if there was a breach of PACE and/or the Codes and more generally whether it would have an adverse affect on the fairness of the proceedings for it to be included or whether the evidence should have been admitted under some other mechanism such as section 23 of the Criminal Justice Act 1988. In this category of appeals, the Court is making its own assessment of the evidence rather than deciding what impact the evidence may have had on the jury. The large number of these grounds upheld shows the Court does not like to interfere with the discretion of the trial judge too often.

The other two groupings of errors by the trial judge are defects in the summing up and misdirections of the law. These two are often used interchangeably as the misdirection may have been given in the summing up but the grounds were separated on the basis of whether a misdirection had been listed or whether the summing up had been referred to. There were two main areas for errors in the summing up. It was either considered to be unbalanced or biased or unfair against the appellant/applicant;⁵⁰⁴ or it was defective or misled the jury.⁵⁰⁵ The Court's review function and decision making process is suited to these appeals. It is possible for the Court to view the summing up on paper and assess whether these criticisms of it are correct and whether the criticisms have made the conviction unsafe. The Court itself is deciding whether the summing up is biased or defective and it is well suited to this role. The fact that so many of these grounds are upheld shows it is not a ground the Court often agrees has made the conviction unsafe.

⁵⁰² *R v N* [2002] EWCA Crim 1595.

⁵⁰³ *R v Leckie* [2002] EWCA Crim 837.

⁵⁰⁴ See, for example, *R v Rawson* [2002] EWCA Crim 1044; *R v Majeed* [2002] EWCA Crim 1496; *R v Brady* [2002] EWCA Crim 837; *R v Henrick* [2002] EWCA Crim 308; *R v Gilmour* [2002] EWCA Crim 1355; *R v Patel* [2002] EWCA Crim 219; *R v Cooper* [2002] EWCA Crim 862; *R v Bravo* [2002] EWCA Crim 984; *R v Henricksen* [2002] EWCA Crim 1373; *R v Wharton* [2002] EWCA Crim 630; *R v Chiori* [2002] EWCA Crim 398.

⁵⁰⁵ See, for example, *R v Amarasinghe* [2002] EWCA Crim 588; *R v Newberry* [2002] EWCA Crim 1396; *R v Hooper* [2002] EWCA Crim 618; *R v Locklin* [2002] EWCA Crim 813; *R v Irvine* [2002] EWCA Crim 827; *R v Agnew* [2002] EWCA Crim 1246; *R v Roye* [2002] EWCA Crim 1005; *R v Armitage* [2002] EWCA Crim 1224; *R v Spriggs* [2002] EWCA Crim 1086; *R v Morris* EWCA Crim 1160; *R v Lockwood* [2002] EWCA Crim 60; *R v Thomson-Swift* [2002] EWCA Crim 49; *R v Stowers* [2002] EWCA Crim 126; *R v Mason* [2002] EWCA Crim 196; *R v Field* [2002] EWCA Crim 367; *R v Marsh* [2002] EWCA Crim 137; *R v Wilcock* [2002] EWCA Crim 118; *R v Benham* [2002] EWCA Crim 528; *R v Homer* [2002] EWCA Crim 353; *R v Habashi* [2002] EWCA Crim 288; *R v Camero* [2002] EWCA Crim 501; *R v Leadbetter* [2002] EWCA Crim 463; *R v Allan* [2002] EWCA Crim 521; *R v Mehmet* [2002] EWCA Crim 514; *R v Howard* [2002] EWCA Crim 547; *R v Baker* [2002] EWCA Crim 918; *R v Abanah* [2002] EWCA Crim 951; *R v Garner* [2002] EWCA Crim 1166; *R v Jumaa* [2002] EWCA Crim 1171; *R v Gunningham* [2002] EWCA Crim 1618; *R v Lawrence* [2002] EWCA Crim 1087; *R v R* [2002] EWCA Crim 1245; *R v Green* [2002] EWCA Crim 1501; *R v Ingram* [2002] EWCA Crim 512; *R v Martin* [2002] EWCA Crim 1214; *R v Goodman* [2002] EWCA Crim 903.

There were a number of different grounds that encompassed misdirections of the law. Some of these are specific to the case itself but others are generally recognised directions. For example these included the judge misdirecting on the burden of proof;⁵⁰⁶ the judge misdirected on the issue of delay;⁵⁰⁷ the judge misdirected on *mens rea*;⁵⁰⁸ the judge should have given the *Ghosh* direction;⁵⁰⁹ a character direction was not appropriate;⁵¹⁰ judge failed to give a good character direction;⁵¹¹ judge should have put the issue of provocation to the jury;⁵¹² judge should not have given a right to silence direction;⁵¹³ there was a misdirection on manslaughter;⁵¹⁴ judge misdirected the jury on duress;⁵¹⁵ judge erred in giving a Watson direction;⁵¹⁶ judge should have given a Lucas direction;⁵¹⁷ judge should have allowed a defence under section 179(3) of the Town and Country Planning Act 1990;⁵¹⁸ judge misdirected on self defence;⁵¹⁹ the judge failed to properly direct on the ingredients of the offence;⁵²⁰ judge should have directed the jury not to draw any inferences from silence;⁵²¹ judge misdirected on recklessness;⁵²² and judge should have given an accomplice direction.⁵²³ In the Court's view none of these irregularities occurred.

There were also a large number of cases where it was alleged the judge had made further errors. These included the judge unfairly intervened;⁵²⁴ judge should have ruled that a witness should not give evidence at a retrial as she had committed perjury during the first trial;⁵²⁵ judge did not deal adequately with a jury note;⁵²⁶ judge should have stopped the trial as there was insufficient evidence for the jury to consider;⁵²⁷ judge should not have allowed the indictment to be amended;⁵²⁸ judge should have discharged the jury after a witness let slip the appellant was known to the police;⁵²⁹ judge should not have allowed the prosecution to cross examine a witness in the way he did;⁵³⁰ judge should not have allowed the prosecution to cross examine him on his defence

⁵⁰⁶ *R v Drummond* [2002] EWCA Crim 527. See also *R v Jones* [2002] EWCA Crim 147; *R v Stannard* [2002] EWCA Crim 458; *R v Spillman* [2002] EWCA Crim 629; *R v Gelderbloem* [2002] EWCA Crim 926.

⁵⁰⁷ *R v Locklin* [2002] EWCA Crim 813.

⁵⁰⁸ *R v Agnew* [2002] EWCA Crim 1246.

⁵⁰⁹ *R v Garner* [2002] EWCA Crim 1166. See also *R v Zengeya* [2002] EWCA Crim 1385.

⁵¹⁰ *R v Lawrence* [2002] EWCA Crim 1087.

⁵¹¹ *R v Naiwo* [2002] EWCA Crim 398.

⁵¹² *R v Emani* [2002] EWCA Crim 490.

⁵¹³ *R v Smart* [2002] EWCA Crim 772. See also *R v Singleton* [2002] EWCA Crim 459.

⁵¹⁴ *R v Garvey* [2002] EWCA Crim 02.

⁵¹⁵ *R v Najmi* [2002] EWCA Crim 505.

⁵¹⁶ *R v Thomas* [2002] EWCA Crim 495.

⁵¹⁷ *R v Mauricia* [2002] EWCA Crim 676.

⁵¹⁸ *R v Clarke* [2002] EWCA Crim 753. See also *R v Stephenson* [2002] EWCA Crim 1231.

⁵¹⁹ *R v Carden* [2002] EWCA Crim 1017. See also *R v Collender* [2002] EWCA Crim 1354.

⁵²⁰ *R v Clemente* [2002] EWCA Crim 1065.

⁵²¹ *R v Thomas* [2002] EWCA Crim 1308.

⁵²² *R v Tomlinson* [2002] EWCA Crim 304.

⁵²³ *R v Johnson* [2002] EWCA Crim 595.

⁵²⁴ *R v Marsh* [2002] EWCA Crim 137. See also *R v Majeed* [2002] EWCA Crim 1496.

⁵²⁵ *R v Walker* [2002] EWCA Crim 1316.

⁵²⁶ *R v Lubban* [2002] EWCA Crim 1298. See also *R v Brown* [2002] EWCA Crim 1262.

⁵²⁷ *R v Litholetoys* [2002] EWCA Crim 1154.

⁵²⁸ *R v Leithead* [2002] EWCA Crim 1149.

⁵²⁹ *R v Hubbard* [2002] EWCA Crim 1159. See also *R v Carroll* [2002] EWCA Crim 792 for a similar argument.

⁵³⁰ *R v Pope* [2002] EWCA Crim 966.

statement;⁵³¹ the indictment should have been severed;⁵³² judge failed to adequately direct the jury in relation to a previous conviction;⁵³³ judge should have allowed an adjournment to call a witness;⁵³⁴ judge should have stopped the trial because of the appellant's mental condition⁵³⁵ and the judge wrongly directed the jury in answer to a question from them.⁵³⁶

There were irregularities in this category that had caused the conviction to be unsafe in the other categories such as the judge misdirecting on the burden and standard of proof, the judge intervening too often, defective silence directions etc. It was not overly clear what the difference was in those categories where the conviction was quashed and the difference in this category where the Court decided the irregularity did not occur. The sheer number of appeals in this category shows that it is very rare for the Court to decide that an irregularity did occur and even rarer still for it to decide that the irregularity has made the conviction unsafe. Whilst there may be some evidence from the human rights cases or the abuse of process cases that a less strict approach to the irregularity may be being taken, it is difficult to argue that this category is not evidence of a mainly strict approach with the sheer number of appeals upheld.

The law after the 2002 sample will now be discussed in order to ascertain whether there have been any major developments.

Procedural Irregularities after 2002

There have been a series of judgments after 2002 which have sought to extend the judgment of *R v Pendleton*⁵³⁷ to the Court's decision making process for procedural irregularity appeals. In *R v Mills* and another,⁵³⁸ Auld LJ stated:

'In our view, the *Pendleton* jury impact test, looked at as a range of permissible intrusion into the jury's thought processes for confirmatory purposes, is equally applicable where the new matter is one of argument, either of law or of interpretation of, or of inference from, the evidence at trial. The Court may also have to ask itself similar questions as to the effect on the jury of evidence improperly given or of other irregularities at trial.'⁵³⁹

As the above has shown, the Court is able to use the jury impact test when quashing convictions as part of its decision making process in deciding whether the irregularity has made the conviction unsafe. But as discussed in chapter five, this approach does

⁵³¹ *R v Coates* [2002] EWCA Crim 963.

⁵³² *R v Jones* [2002] EWCA Crim 735. See also *R v Thomson* [2002] EWCA Crim 431 and *R v Bell* [2002] EWCA Crim 1719.

⁵³³ *R v Pinfield* [2002] EWCA Crim 348.

⁵³⁴ *R v Watson* [2002] EWCA Crim 420. See also *R v Ervens* [2002] EWCA Crim 1085.

⁵³⁵ [2002] EWCA Crim 1160.

⁵³⁶ *R v Spriggs* [2002] EWCA Crim 1086.

⁵³⁷ [2002] 1 WLR 72. See chapter five.

⁵³⁸ [2003] All ER (D) 221.

⁵³⁹ *Ibid*, para. 64.

not necessarily result in the Court quashing the conviction. As the case of *Pendleton* showed there were differing opinions as to how *Pendleton* should be interpreted. Lord Hobhouse preferred the reinforcement of *Stafford* which allowed the Court to decide the issue for itself whereas Lord Bingham emphasised the jury impact test as a way of confirming what the Court's view of the new evidence was (and what Auld LJ is referring to). The cases from the 2002 sample showed that in relation to fresh evidence, the *Stafford* approach resulted in more convictions being quashed and it would appear that this approach has also resulted in more procedural irregularity convictions being quashed. So the reinforcement of the jury impact test in relation to procedural irregularities is not necessarily beneficial to those trying to get their convictions overturned over the Court deciding the issue for itself. But the Court is used to a procedural irregularity test which involves testing the irregularity on a jury because this was the approach taken to the proviso under *Stirland*. It would appear, therefore, that Auld LJ is not suggesting anything new.

The Court has specifically extended Lord Bingham's jury impact test to the approach of the Court when assessing undisclosed evidence at trial in *R v Nawaz, Latif, Shahzad, Osman and Rasool*,⁵⁴⁰ This case was originally heard as *R v Latif and Shahzad* as discussed above⁵⁴¹ and previous Court of Appeal and House of Lords judgments had been upheld. In relation to the appeal of *Osman*, Lord Justice Hooper stated 'this court is required under the law as it currently stands to consider what impact the undisclosed material might have had on the jury's verdict had it been available to them at trial' citing Lord Bingham's speech in *Pendleton*. If the Court is being asked to assess non disclosed evidence then this is, in effect, similar to its role in deciding fresh evidence appeals by having to review the evidence the jury saw and the evidence the jury did not see and then deciding if the conviction is unsafe. In that sense, it is logical that *Pendleton* would be seen to be applying to the Court's decision making process for non disclosure appeals. These appeals can also appear to be fresh evidence appeals if the non-disclosure has produced new evidence. But, as discussed above, this does not necessarily mean that more convictions will be quashed as a result of it.

There have also been developments in the Court's approach to unfair trial and unfair to try decisions and safety. Despite there being no cases in the 2002 sample that were quashed on the basis of an abuse of process, there have been cases since that have been overturned. In *R v Early and others*,⁵⁴² the 8 appellants were convicted of various offences involving fraud on the public revenue. They had been tried at 3 separate trials but had all pled guilty. The prosecution had concealed from the judge in a Public Interest Immunity

⁵⁴⁰ [2007] EWCA Crim 307. See also *R v Beardall and another* [2006] EWCA Crim 577; *R v Vernett-Showers and others* [2007] EWCA Crim 1767.

⁵⁴¹ See above, n.336.

⁵⁴² [2002] All ER (D) 419.

(PII) hearing that certain witnesses were informants. The appellants had argued that there had been an abuse of process but the judge conducted that hearing without the information of the informants and dismissed the argument. But the appeal court quashed the convictions following *Mullen* and *Togher* despite the guilty pleas.⁵⁴³ In *R v Grant*,⁵⁴⁴ the police had placed covert listening devices in the exercise yard at police stations and had recorded conversations between suspects and their lawyers. He had been convicted of conspiracy to murder. The appellant had argued at trial that there had been an abuse of process. The Court allowed the appeal with Laws LJ stating 'in all these circumstances, we conclude that there was abuse of the process here and Astill J should have stayed the proceedings in consequence. We understand it to be accepted that if the court reaches this conclusion, the conviction falls to be treated as unsafe.'⁵⁴⁵

The Court appears to be saying that if it decides there was an abuse of process then the conviction must be unsafe but this view was disputed in *R v Ali* and another.⁵⁴⁶ In this case the conviction was quashed as important documents had been destroyed during the period of what the Court called unjustified delay. In the judgment, Moses LJ drew a distinction between when unfair to try and an unfair trial would result in a conviction quashed. He stated:

'We acknowledge that in cases where it was unfair to try the defendant at all, because of bad faith or executive manipulation, the verdict itself may not be unsafe. But in general, where this court concludes that a hearing was unfair, it will not be able to avoid the conclusion that the verdict was unsafe.'⁵⁴⁷

And that:

'Safe verdicts depend upon a fair resolution of the issue of guilt or innocence. Attempts to draw a distinction between the fairness of the process and the safety of the verdict have, traditionally in this court, failed.'⁵⁴⁸

This appears to be suggesting that where it is unfair to try the appellant (as in *Grant*) then this does not necessarily mean that the conviction is unsafe whereas if it is an unfair trial then this does lead to an unsafe conviction. This seems to be saying that in *Mullen* type situations the abuse would not necessarily lead to the quashing of the conviction.

⁵⁴³ See *R v Gell* [2003] EWCA Crim 123 and *R v Choudhery* [2005] EWCA Crim 1788 for appeals allowed in similar circumstances.

⁵⁴⁴ [2005] All ER (D) 44.

⁵⁴⁵ *Ibid*, para. 58.

⁵⁴⁶ [2007] EWCA Crim 691.

⁵⁴⁷ *Ibid*, para. 28.

⁵⁴⁸ *Id*.

It is worth briefly mentioning at this point recent Government proposals in this particular area which have since been dropped but give an illustration of the current political climate in which the Court is operating. This may or may not have had an effect on the Court's decision making process. In September 2006, a consultation was issued by the Office for Criminal Justice Reform from the Home Secretary, the Attorney General and the Lord Chancellor which proposed changes to the appeal process.⁵⁴⁹ It was stated in the introduction that:

'it may come as a surprise to some that the existing law empowers the Court of Appeal to quash a conviction on purely procedural grounds even where the judges of that Court have no doubt the appellant is guilty. Such outcomes are damaging to public confidence in the criminal justice system. They may also put the public at further risk of crime.'

The Government wished to change the law to address this but the consultation paper made it clear that the Government was not consulting on whether the law should be changed but how the law should be changed and asked for comments on that basis. There then followed a fairly superficial analysis of the law which included a mention of the '1985 Royal Commission on Criminal Justice' which presumably was meant to be the 1993 Royal Commission on Criminal Justice. The Government set out its view that:

'the Government believes that the law should not allow people to go free where they were convicted and the Court are satisfied they committed the offence. The Government believes that legislation is now needed to change the position because the approach of the Court of Appeal appears now to be settled. Moreover, it is right that Parliament should debate the desired effect of the test which it has itself provided (and amended)' (Office for Criminal Justice Reform, 2006, paras. 31-32).

There were three proposals designed to achieve this which were to 're-instate a proviso similar to that which was part of the original statutory test so as to provide that the appeal should not be allowed, even if there is a procedural irregularity, if the Court consider no miscarriage of justice actually occurred' or 'replace the proviso with another formulation, designed to achieve the same end, and perhaps addressing more directly the Court's view (where they have reached one) of the guilt of the appellant' or 'recast the test and the task of the Court of Appeal so as to require a substantial re-examination of the evidence (akin to the task of the jury)' (para. 33).

There was widespread objection to these proposals on the basis of both principle and how this would work in practice. Many of the responses to the consultation took the opportunity to express how dissatisfied they were with the proposals despite the Government asking for suggestions on how this could be implemented and not whether

⁵⁴⁹ Available from <http://www.homeoffice.gov.uk/documents/cons-2006-quashing/cons-2006-quashing-convictions2?view=Binary>.

it should be implemented.⁵⁵⁰ However, the Government decided to press on and introduced clause 26 in the original Criminal Justice and Immigration Bill which would amend section 2 of the CAA 1968 and stated that 'a conviction is not unsafe if the Court of Appeal are satisfied that the appellant is guilty of the offence' with the caveat that stated this section did not prevent the Court of Appeal from the allowing the appeal where they think it would be incompatible with the appellant's convention rights to dismiss the appeal. As a result of criticism of this it was later changed to clause 42 which read 'a conviction is not unsafe if the Court of Appeal think there is no reasonable doubt about the appellant's guilt.' There was also an additional section where even if the Court of Appeal think there is no reasonable doubt about guilt, they can still allow the appeal if they think that it would seriously undermine the proper administration of justice to allow the conviction to stand. There had been strong opposition to the clause as it had gone through Parliament.⁵⁵¹ The Government decided to drop the clause to expedite the legislation through Parliament.

The Government had estimated that this would apply to around twenty cases per year but this was a debatable point. There did not appear to be any cases in the 2002 sample of the *Mullen* type where the conviction was quashed despite the Court's express view that it viewed the appellant to be guilty. But there were a number of cases where the Court upheld the conviction where it could be argued the Court viewed the appellant to be guilty such as those cases where the irregularity is minor or where the Court viewed there was strong prosecution evidence. If these cases were included then the provisions would apply to a larger number of cases but if they applied to those cases where the Court expresses the view that the appellant is guilty such as in *Mullen*, then these would be very rare. Whilst cases such as *Mullen*, *Early* and *Grant* show the Court does quash convictions of those it considers guilty, or who plead guilty, it only does this when the irregularity is extremely serious. But generally, it would appear from the Government's proposals and the 2002 sample that Lord Browne-Wilkinson's dirty dog principle is still being used, albeit that it may be more embedded in a language of rights and fairness.

There have been suggestions that there has been a change of attitude more recently in the Court in relation to technicalities as a result of the Criminal Procedure Rules which came into force on the 4 April 2005. The overriding objective of the Rules involves dealing with cases justly. This includes 'acquitting the innocent and convicting the guilty'.⁵⁵² This notion that the Court of Appeal should focus on what is 'just' in the sense

⁵⁵⁰ See, for example, Justice (2006); CCRC (2006); CALA (Criminal Appeal Lawyers Association) (2006); Criminal Bar Association (2007); Law Society (2007); Liberty (2006). In terms of the academic debate, see, for example, Quirk (2007); Spencer (2007); Spencer (2006).

⁵⁵¹ See for example some of the debate at http://www.theyworkforyou.com/psc/2007-08/Criminal_Justice_and_Immigration_Bill/10-0_2007-11-20a.8.0.

⁵⁵² See *R v Ashton*, *R v Draz* and *R v O'Reilly* [2006] EWCA Crim 794; *R v Boyle*, *R v Ford* [2006] EWCA Crim 2010; *R v Clarke and McDaid* [2008] UKHL 8. For academic discussion see Spencer (2007).

of acquitting the innocent is an attractive one and if that is now happening then it is to be encouraged. It is to be acknowledged that not every procedural irregularity should result in the conviction being quashed and not all guilty people are entitled to their convictions being overturned. But what is unassailable is that factually innocent people are always entitled to their convictions being overturned. If a more 'just' approach means this will be more of a consideration then that is to be welcomed.

As discussed in chapter three, one of the mechanisms we have for judging the Court's performance is the number of times an appellant has to return to the appeal court before it is overturned. As discussed in chapter one, Naughton argues that criminal justice reform typically focuses on exceptional cases which are those cases that are referred back to the Court of Appeal after the initial appeal has failed. He argues that the consequences of focusing on the 'exceptional' cases are that the true scale of miscarriages of justice may be overlooked and an extensive range of harmful consequences (zemiological harms) may also be overlooked (Naughton 2007). Quirk has also argued that this focus on high profile atypical cases has led to the neglect of convictions overturned at first instance and those quashed owing to legal or procedural irregularities (Quirk, 2007, p. 769).

But what Naughton and Quirk fail to acknowledge is the contribution those appeals quashed owing to legal or procedural irregularities have made. All the research studies conducted so far on the judgments of the Court of Appeal, for example, have all used those appeals quashed at the first opportunity to gather information on how the Court interprets its power. And as the 'exceptional' cases are so rare the opportunity for them to bring about reform is very limited so those appeals that do consist of mainly legal or procedural arguments are contributing to law reform on a daily basis. That is not to say that it is only the first appeal that will consist of procedural irregularities because the exceptional appeals will also consist of procedural irregularities but the first appeals are more likely to only be focused on procedural irregularities due to the twenty-eight days the appellant has to appeal after conviction.

What Naughton and Quirk fail to address, and what this chapter has highlighted as a problem, is why the 'exceptional' appeals are so exceptional. For most of the exceptional appeals that are founded on factual innocence, the appellant will already have gone through the appeal process on a procedural irregularity argument and been unsuccessful. Therefore, there are many factually innocent appellants who are failing with procedural irregularity appeals and who are then having to negotiate the problems of fresh evidence appeals as discussed in chapter five, or having to locate a new procedural irregularity to try again. This is particularly difficult for the factually innocent who find both fresh evidence appeals and lurking doubt appeals so problematic that they

have to frame their appeals in technicalities as they know this will give them a higher chance of success. This may also be a reason why the CCRC refers so many 'technical' appeals and so few based on new evidence. If the Court is more conducive to these arguments and factually innocent people have to frame their appeals in technicalities to achieve success then this is reinforced by the CCRC who refer cases on that basis. Although this does assist the factually innocent person with a procedural irregularity argument, it does not help those who are factually innocent and who do not have a procedural irregularity argument and who the CCRC is not helping with its focus on procedure.⁵⁵³

The procedural irregularity appeals discussed in this chapter have shown that the Court tends to focus on the irregularity and evidence of the appellant's guilt and whilst this is important, it should also be focused on the possibility that those appearing before it may also be factually innocent of those crimes. The requirement for repeat visits to the appeal court for some cases will never be eradicated because there may be changes in the law or procedure that mean the appellant has a much stronger argument on the second appeal than he had on the first appeal which justifies the overturning of the conviction. But the fact that history has shown that the factually innocent appellant often has to return to the appeal court a number of times before the conviction is overturned should require the Court to focus not only on the guilty but also on the innocent. If the Criminal Procedure Rules have resulted in a change of attitude for the Court in this respect then it is to be encouraged so the factually innocent can succeed at the first opportunity and the Court can rectify the miscarriage of justice rather than being one of the causes of it.

Summary

It is impossible to assess whether changing the test to 'unsafe' has made any difference to procedural irregularity appeals without a wider consideration of the impact the Human Rights Act 1998 may also have made. These appeals are difficult to assess generally in light of the problems of defining concepts such as rights and fairness and the different approaches the Court takes to these appeals.

There are some conclusions that can be drawn about the Court's approach after the new safety test came into force. The changes in the test did not downgrade the importance of procedural irregularities, despite the case of *Chalkley and others*. There are arguably now more types of irregularities than before the CAA 1995. The HRA has added additional grounds on which to appeal under the various articles and most predominantly under Article 6. There is also the distinction between when it is an unfair trial and when it

⁵⁵³ For a discussion on the problems for factually innocent appellants and the CCRC, see Roberts and Weathered (2009).

is unfair to try the appellant. But the evidence as to the impact the safety test and the HRA have had on procedural irregularity appeals is once again, contradictory.

In 1990, of the total procedural irregularity grounds, there were 32% of the grounds allowed. But in 2002, there were 10% of the grounds allowed. This is partially explained by the the huge increase in grounds in 2002 (641) to 1990 (329) and potentially evidence that arguing more grounds does not necessarily lead to more success. This may also be potentially evidence that the HRA has not had a big impact on success rates. The most common grounds between the two samples were errors of the trial judge and these constituted 59% of the total grounds in the 1990 sample and 49% in the 2002 sample which is further evidence that a wider variety of procedural irregularities was being argued in 2002. When comparing the three most common grounds, 40% of these grounds were allowed in 1990 with 18% allowed in 2002 which accords with the general figures above. In terms of the statistics, it does not appear that the HRA has had a significant impact as none of the HRA grounds were successful. This is evidence to suggest that the Court is adopting a strict approach to the procedural irregularity despite the enactment of the HRA. There were also twenty-three abuse of process grounds that were unsuccessful which is further evidence of the Court's strict approach. But there were judgments where it was not argued that there had been an unfair trial but the terminology was used when quashing the conviction so this shows that the Court is considering this even if the appellant is not arguing it. This could be evidence that the HRA has had an impact on the Court's decision making even if that impact is not measured in the appellant arguing that specifically and succeeding with it.

Therefore, if we measure the value of due process in the overturning of convictions, it would appear that the Court is adopting a strict approach to the HRA and due process arguments raised that were rejected. But there may also be a value in due process that does not result in the conviction being quashed. This may result from the rhetoric of the judges in the cases which may be of use in other cases which may use that rhetoric to achieve the overturning of the conviction for the appellant. It may also be of use in sending out messages to the prosecuting authorities to not engage in unacceptable practices. For example, in *Rodger*, the Court agreed that evidence of interviews undertaken without a caution should have been excluded as this was a significant and substantial breach. This gives an indication of what breaches of PACE the Court will tolerate and which ones they will not. Similarly, in *Mason* the Court agreed that covert taping was a breach of Article 8. In both judgments the appeal was upheld illustrating that whilst the Court was giving guidance as to what will amount to a procedural irregularity, it took a strict approach to that irregularity in the face of the strength of guilt of the appellant. There are also judgments where the Court is making a declaration as to whether English law is compatible with the ECHR. The Court's decision making in those

cases can be a valuable precedent for others to follow. There are further examples of this in the abuse of process arguments such as *Thomas* where the Court develops the point of legal principle that if there is tension between 'safety' and 'unfairness' then this would enable the Court to depart from a previous decision when there was no new evidence or argument. This is valuable for other cases following this, and we may see the benefit of this for the appellant in *Mills* and *Poole* where the conviction was overturned. So whilst the Court may have taken a strict approach in *Thomas* it may have led to a less strict approach on the same argument in *Mills and Poole*. This shows that the evidence as to what may be a strict or less strict approach may be contradictory depending on the appeal judges which adds to the Court's inconsistent approach.

The Court's inconsistency was further illustrated by looking at those cases that were overturned. Although the Court did quash convictions, mainly when it viewed the irregularity had occurred as well as when viewing it may have had made an impact on the jury, there were so few convictions overturned. The grounds where the Court did overturn the conviction seemed fairly fundamental such as misdirecting on the burden and standard of proof and the judge appearing to sway the jury with his/her views, but these did not seem that different to appeals that were upheld. The differences between them, therefore, were not overly clear. The largest number of appeals came under the category of the Court not agreeing that an irregularity had occurred. This seemed to be taking a very strict approach to deciding the appeal which is evidenced by the sheer number of appeals in this category. This shows that whilst it may be easier to succeed on a procedural irregularity appeal, this is not in itself, an easy process. This has implications for the factually innocent and the factually guilty. It would appear that the focus of the Court is on the irregularity itself and the evidence of guilt and there does not seem to be a wider consideration of whether this person is factually innocent. That is a common theme through all the Court's decision making and will be discussed in more detail in chapter nine. The lack of any cases in the sample where the conviction was quashed where the Court viewed the appellant to be overtly guilty shows that these cases are rare.

Whilst the academic literature has tended to focus on the relationship between fairness and safety and arguments such as rights and fairness, the sample shows that this only forms a small part of the Court's considerations. Whilst concepts such as moral integrity and moral legitimacy are important, if we just concentrate on those issues relating to abuses of process and human rights they provide a skewed view of the bulk of the work of the Court. The small number of these appeals, whilst very important, does not address the real problem here which is the sheer number of errors trial judges make which have to be overturned on a daily basis. Naughton is therefore correct in that these appeals do tend to get ignored as there has to be a reason why judges are making so

many mistakes and why they continue to form the bulk of the Court's work. Therefore, although notions of rights, fairness, legitimacy and integrity are extremely important, they are difficult to enforce without a clear definition of what they mean and in that sense, Ashworth and Redmayne are correct in that they may be too vague. The language of fairness is not new to the Court, and whilst it may be much more of a focus for the Court, it still has to consider the same grounds of appeal that were argued prior to the enactment of the HRA. The HRA has given appellants a new layer of argument in the sense of whether certain provisions are compatible with the HRA and whilst the HRA may strengthen the grounds of appeal for some appellants, it is difficult to argue that the Court is adopting a less strict approach to the procedural irregularity as a result of the HRA. In that sense it would appear that Nobles and Schiff were correct in their prediction that the HRA would not necessarily change the Court's decision making process.

In chapter eight, the Court's approach to its retrial power will be discussed.

CHAPTER EIGHT: THE POWER TO ORDER A RETRIAL

The solution to many of the Court of Appeal's problems may appear to be straightforward: it should order more retrials. This would potentially solve the problem of the Court deciding the merits of fresh evidence against the evidence at trial. It would also potentially solve the problem of the Court trying to second guess what the jury, or a reasonable jury, may have made of a particular irregularity. But the difficulty in relation to retrials is that the Court has to quash the conviction before it can consider the possibility of ordering a retrial. As the previous chapters have shown, the Court does not overturn many convictions. Therefore, the opportunity to order a retrial only arises in a small number of cases. This is not the only problem in relation to retrials however. This chapter will examine the appeals from the sample of judgments from 1990 and 2002 where a retrial was considered. This is necessary in order to ascertain whether the Court uses a particular approach to retrials and in what circumstances a retrial may, or may not, be ordered. It will also be necessary to see if the approach the Court has taken has changed and if so, whether it can be attributable to the changes in the Criminal Appeal Act 1995. It will also examine the Court's approach to retrials after the 2002 sample in order to ascertain what the current approach of the Court is.

The historical approach to retrials

As discussed in chapter three, the power to order a retrial had not been given in the CAA 1907 even though it had been a feature of many of the defeated bills before the Court was created. Subsequently, this caused major problems for the Court's application of the proviso and there were many judgments in the early days of the Court where the judges expressed their regret that no provision was made in the legislation for new trials.⁵⁵⁴ In 1952, the Home Secretary and Lord Chancellor appointed a Departmental Committee under the Chairmanship of Lord Tucker (Tucker Committee, 1954) to consider whether both the Court of Criminal Appeal and House of Lords should be given the power to order a retrial. The Committee spent two years reviewing the issue of retrials and finally reported in 1954. The arguments for the power were far outweighed by arguments against. One of the arguments against was that 'the prolongation of criminal proceedings is against the public interest because it is a cardinal principle that the administration of justice should be swift and final' (Tucker Committee, 1954, para. 16) thereby emphasising the principle of finality. The Committee was unanimous in proposing that the Court should be given the power to order a retrial in fresh evidence

⁵⁵⁴ See for example *R v Dyson* [1908] 2 K.B. 454; *R v Colclough* (1909) 2 Cr. App. R. 84; *R v Ellsom* (1911) 7 Cr. App. R. 4; *R v Emilio Rufino* (1911) 7 Cr. App. R. 47. For a detailed history of the Court's retrial power, see O'Connor (1969).

cases but were divided by a majority of 5 to 3 as to whether it should be granted in all cases. Those against again gave the reason that it would be 'a derogation from the principle of finality' (Tucker Committee, 1954. para. 35).

The Tucker Committee proposal to give the Court the power to order a retrial in fresh evidence cases was not implemented until ten years after it reported. This was possibly due to the lack of public interest as public pressure is usually the catalyst for reforming the appeal process. Indeed, it was the high profile case of Aloysius 'Lucky' Gordon which provided the impetus needed for implementing the Tucker Committee proposal as the case 'served to crystallise a growing uneasiness about the limitations of the Court' (Justice, 1964, p. 28). Gordon had been convicted of assaulting Christine Keeler and fresh evidence led the Court to quash the conviction but the general feeling at the time was that a complete acquittal was inappropriate and this controversy might have been avoided had the Court had the power to order a retrial.

The power to order a retrial in fresh evidence cases was initially in section 1 of the CAA 1964, which later became section 7 of the CAA 1968. This allowed the Court to order a retrial once it had decided to quash the conviction.

In 1980, the Scottish High Court was given a general power to order a retrial which meant that England and Wales became the only common law jurisdiction in the world not to have one. Calls for the Court to be given a general retrial power gathered momentum. The Law Commission looked into the matter and produced a report in 1986 (Law Commission, 1986). The report stated that because the matter had not been considered by Parliament since 1964 the then present senior judges had not had the opportunity to express their opinion on the matter. The report recommended that a general power should be given to the Court. The Government then produced a consultation paper and as a result a general power was conveyed in section 45 of the 1988 Criminal Justice Act. The Court was initially slow to use this power but there has been a big increase in its use and this chapter will examine why.

Malleson's sample of judgments from 1990 will be analysed first.

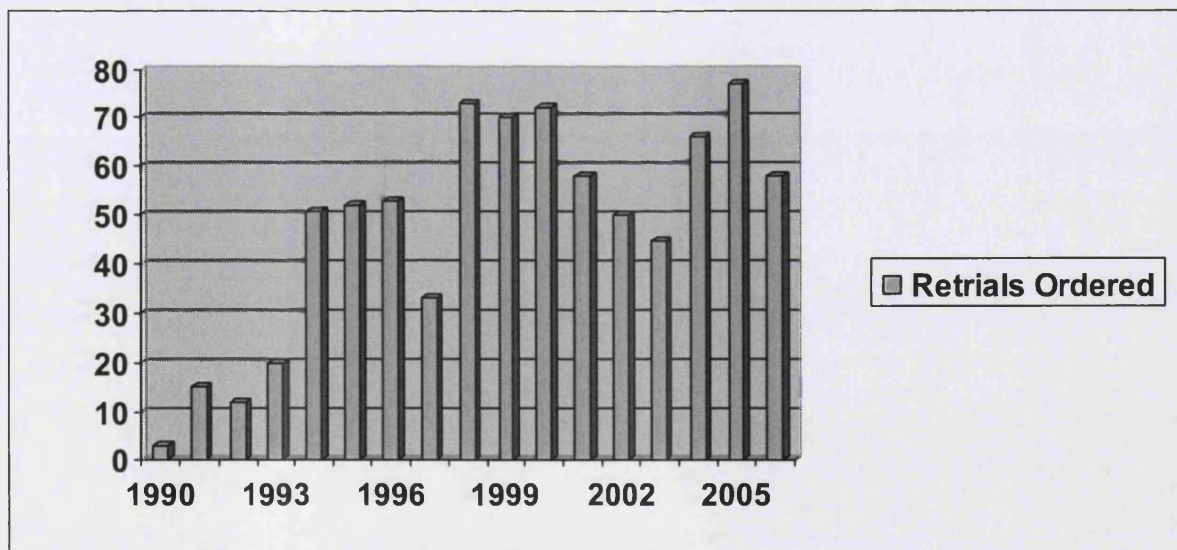
The 1990 sample of judgments

Malleson states (1993, p. 13) that there were two cases in the sample in which retrials were ordered. Both involved fresh evidence. In a third case the Court stated that they would have ordered a retrial but for the fact that the grounds of appeal were lodged before section 43 of the Criminal Justice Act 1988 came into force. In two cases, counsel for the Crown argued unsuccessfully that there should be a retrial.

Malleson states that the two cases in which retrials were ordered did not appear to have any obviously unique features which distinguish them from the other fresh evidence cases. One raised fresh forensic evidence and the other concerned an identification witness who claimed to have wrongly identified the appellant. Malleson states (p.14) from the information set out in the judgments, it was hard to discern any reason why these rather than other fresh evidence cases should have been considered suitable for a retrial.⁵⁵⁵ Malleson concluded that the power to order a retrial is clearly one which the Court considers to be appropriate only very rarely. With the exception of the one case cited above, she states that the enactment of section 43 of the Criminal Justice Act 1988 does not appear to have broadened the Court's application of this power. She states that the explanation for the Court's limited application may lie with the wording of section 7(1) CAA 1968. Because the Court must allow an appeal before they can order a retrial, the Court has a choice between quashing the conviction outright and ordering a retrial, not a choice between dismissing an appeal and ordering a retrial. Malleson states that once the Court has determined that the conviction is unsafe and unsatisfactory the normal course of action seems to be to quash the conviction outright, rather than ordering a retrial (p. 14).

After Malleson's sample, the Court showed a willingness to order more retrials. This is illustrated in the graph below:

Graph 8.1: Retrials ordered 1990 to 2006⁵⁵⁶



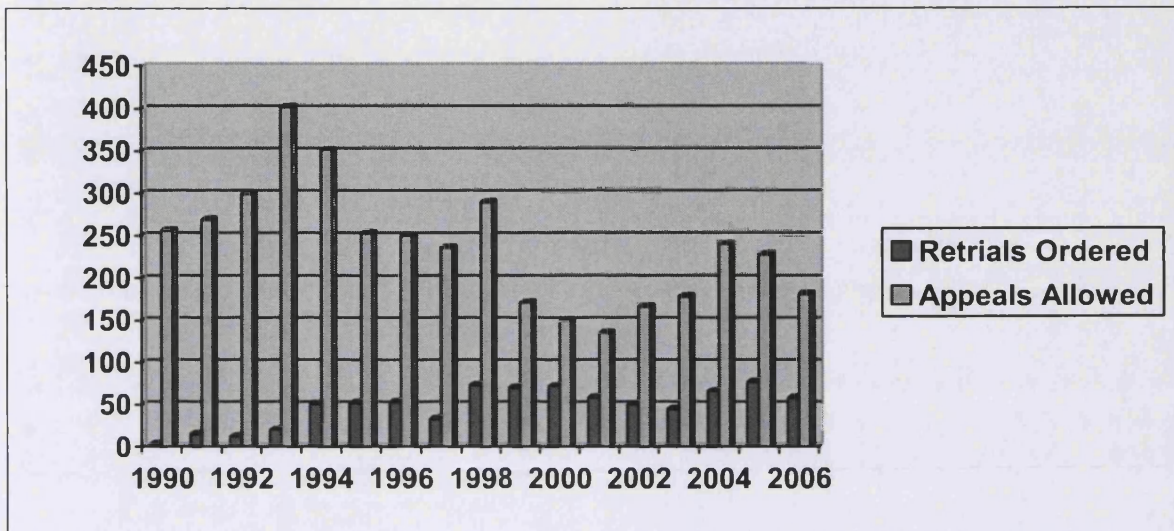
As these figures show, after the very small number of retrials ordered in 1990 (three) there was a steady increase with fifty-three ordered in 1996 which dipped down to thirty-

⁵⁵⁵ Citing *R v White* 6/7 and *R v Houghton* 3/4.

⁵⁵⁶ Figures taken from *Judicial and Court Statistics 2006* (HMSO: Cmnd 7273) November 2007.

three in 1997 but which rose again to seventy-three in 1998. There was then a dip down to forty-five in 2003 which rose to seventy-seven in 2005 and a dip to fifty-eight in 2006. Whilst these figures are slightly erratic, they do show an increase before and after the enactment of the CAA 1995. This can be more clearly illustrated in the graph below which shows the number of retrials ordered against the number of appeals allowed.

Graph 8.2: Retrials ordered and appeals allowed 1990 – 2006



As discussed in chapter four, the rise in the number of appeals allowed from the early to the mid-1990s is potentially evidence that the Court was going through a liberal phase under its new Lord Chief Justice, Lord Taylor, who was appointed in 1992. The rise in the number of retrials ordered in this period was also interpreted as being evidence of that liberal approach. But it is debatable as to whether a rise in the number of retrials being ordered is evidence of a more liberal approach. The Court cannot order a retrial unless it decides to quash a conviction. The rise in the number of appeals allowed in the mid-1990s would seem to correlate with the rise in the number of retrials as more convictions quashed gives rise to the possibility of more retrials. However, the rise in retrials ordered is not necessarily explained by the rise in appeals allowed as the figures from 1999 to 2006 show that whilst a smaller number of appeals were being allowed, the retrials figure remains relatively high compared to the figures from 1990 to 1997 where there were a higher number of appeals allowed but less retrials ordered. If the Court orders a retrial then this is disadvantageous for the appellant who has to go through the trial process again. However, the rise in the number of retrials could be evidence that the Court is less inclined to decide the issue for itself and uphold the appeal. This benefits the appellant as there is a chance of acquittal on the retrial as opposed to the Court deciding the appeal should be upheld. The graph shows that after the relatively low number of retrials ordered in 1997, the number of retrials has continued to be relatively

high since then, especially compared to the number of appeals allowed since 1999, and the potential reasons for that will be explored below.

The Royal Commission on Criminal Justice was divided over the use of retrials.

The Royal Commission on Criminal Justice

The Commission acknowledged that the Court was increasingly using its power to order a retrial which they 'welcome and wish to encourage' (RCCJ, ch.10, para. 65). They stated that retrials 'offer the Court of Appeal an attractive solution for its understandable reservations about the speculative prediction of a hypothetical jury's decision' (para. 65). But they did exercise a note of caution:

'There are obvious attractions in the option of a retrial where the Court of Appeal thinks it possible but not certain that the jury would have acquitted the appellant had it known of the new considerations advanced in the course of the appeal. But retrials are not a panacea. Quite apart from the expense involved there are bound to be cases where a retrial will be impracticable and even unjust. The conviction may, for example, be too long ago or the witness no longer available, or it would be unfair to a victim to be required to give his or her evidence again, or the appellant may already have been released from prison or following the discharge of the first jury, already have been tried for a second time' (RCCJ, ch.10, para. 33).

The RCCJ's approach to retrials and fresh evidence was discussed in chapter five but essentially the Commission felt that 'wherever possible the Court should order a retrial of the case rather than decide the issue for themselves' as 'the Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the ultimate credibility and effect on a jury of the new evidence' (ch.10, para. 62). But the Commission also stated that where a retrial was impracticable or otherwise undesirable, the Court of Appeal should follow the *Stafford* test and decide the matter for itself rather than just simply allowing the appeal (ch.10, para. 63).

The Commission stated that 'where the court is not in doubt, there is no difficulty in allowing or dismissing the appeal as appropriate. Where, on the other hand, the court is in doubt and would like to see the evidence or arguments more fully tested, then, other things being equal, retrials seem to all of us the better way to proceed, even if some of us would not like them to be as frequently ordered as would others' (para. 65). They were divided over what should happen where fresh evidence is not available and a retrial was not possible. Six of them took the view that the court had no choice but to allow the appeal as if the court decided the conviction may be unsafe and wished to send the case to a new jury, it was no longer possible to say that the appellant was guilty beyond reasonable doubt and therefore the appellant should go free. However, the

other five believed that the court should then consider further whether it should quash the conviction or uphold it as the impossibility of a retrial was not a sufficient reason for automatically allowing the appeal. So the Court should then decide the matter for itself (ch.10, para.66).

After the enactment of the CAA 1995, there was some general guidance given by Lord Bingham in *R v Graham*⁵⁵⁷ on the considerations the Court is weighing up in deciding whether to order a retrial. He stated that the decision to order a retrial:

'.....requires an exercise of judgment, and will involve consideration of the public interest and the legitimate interests of the defendant. The public interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution can be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant will often call for consideration of the time which has passed since the alleged offence, and any penalty the defendant may already have paid before the quashing of the conviction.'

This will now be discussed in relation to the 2002 sample of judgments.

The 2002 sample of judgments

In the 2002 sample of judgments, a retrial was ordered in twelve cases. The possibility of a retrial was raised in a further fourteen cases but the decision was made not to order a retrial. Therefore, a retrial was ordered in 16% of the appeal grounds allowed. In the 1990 sample, there were two retrials ordered which represented 2% of the appeal grounds allowed (101). This is evidence that the Court was more likely to order a retrial in 2002 than 1990. This is in line with the general figures above which show that in 1990 there were 256 appeals allowed and three retrials ordered and in 2002 there were 166 appeals allowed with fifty retrials ordered. Therefore, in 1990 a retrial was ordered in 1% of all appeals allowed whereas in 2002, a retrial was ordered in 30% of the appeals allowed. In the 2002 sample, three of the cases where a retrial was ordered involved fresh evidence and the other nine involved procedural irregularities. The judgments from 2002 will now be analysed qualitatively in order to determine how the Court approaches its task. The cases where a retrial was ordered will be analysed first.

Retrial ordered

The Court has three options when quashing the appeal. The first is to substitute the verdict for another, the second is to order a retrial and, the third is to do neither of those and just allow the appeal. The problems of which option to take were highlighted in *R v Bedford*.⁵⁵⁸ The ground of appeal was that there had been a misdirection by the judge

⁵⁵⁷ [1997] 1 Cr. App. R. 302.

⁵⁵⁸ [2002] EWCA Crim 893.

which had meant that the jury were not able to fully consider properly the defence of provocation. Counsel for the appellant wished the Court to substitute a verdict of manslaughter for murder because of 'the age of these events' and the fact that the principal witness in the case was a child. The Court declined to do this and Rose LJ stated:

'Whether or not events can properly be characterised as giving rise to provocation reducing what would otherwise be murder to manslaughter is, statutorily, a matter for the jury's determination. It is certainly no part of this Court's function to assess whether, in a particular state of evidence, provocation does or does not arise. That is a matter for a jury, not this court.'⁵⁵⁹

A retrial was ordered in this case. The difficulty for the appellant is that he runs the risk of being convicted again on the retrial whereas if the Court substitutes the conviction, he at least has a manslaughter conviction which is the most he can hope for if he runs provocation again on the retrial. This case can be compared to *R v Roberts*⁵⁶⁰ in the sample which raised fresh expert evidence on appeal of the appellant's personality traits. It was felt that the defence of provocation had not been properly canvassed before the jury even though there had been evidence at the trial of the appellant's personality traits. The evidence was essentially being adduced on appeal to strengthen the argument made at the trial. The Court accepted the evidence and substituted a manslaughter conviction for a murder one. The Court stated that if the evidence at the trial, and the new psychiatric evidence on appeal which had reinforced the psychiatric evidence before the jury, had been appreciated there would have been a realistic prospect that the trial jury would not have excluded provocation. This appears to be the Court usurping the role of the jury and dismissing the jury's consideration of evidence it had already heard. It is not clear why the Court could do this in *Roberts* but refused to do so in *Bedford*, instead preferring to order a new trial.

A similar issue arose in *R v McMillan*⁵⁶¹ in which fresh evidence was adduced that the appellant was suffering from a brain tumour which was not known the appellant was suffering from at the time of the trial. If it had been known it may have had an impact on the jury's consideration of provocation as it would have been relevant to his characteristics. The Court quashed the conviction and the Crown requested a retrial. McMillan's counsel suggested that the Court consider substituting a manslaughter conviction and argued against a retrial on the basis that the appellant had already served 8 years in custody, the age of the offence and the fact that there was uncertainty as to which witnesses were available. The Court gave the Crown the opportunity to agree with the decision on account of the 'great deal of expense' and 'a complicated issue to go before a jury.' The Crown resisted on the basis that this was not a clear cut

⁵⁵⁹ *Ibid*, para 17.

⁵⁶⁰ [2002] EWCA 1069. See page 88.

⁵⁶¹ [2002] EWCA Crim 114.

case of diminished responsibility and there were other factors for the jury to consider. Lord Woolf agreed with the Crown and ordered a retrial. This appears to be a somewhat harsh decision given that the appellant had served 8 years and was suffering from a brain tumour but may be illustrative of the approach which explains the rise in retrials. It may be that previously this would have been decided by the Court itself and the conviction would have been upheld or a manslaughter conviction substituted.

There are a number of judgments where the Court considers the seriousness of the offence and decides to order a retrial because the crimes they committed were serious. This occurred in *R v P*,⁵⁶² *R v Adam*,⁵⁶³ *R v Johnson*,⁵⁶⁴ and *R v Demir*.⁵⁶⁵ But the other cases show a variety of reasons why a retrial would be ordered. In *R v Snooks*,⁵⁶⁶ counsel for the appellant argued that it would not be in the complainant's best interests for a retrial to be ordered but Mantell LJ was clearly not impressed with that argument and ordered a retrial. In *R v Round*,⁵⁶⁷ the Court quashed the conviction and ordered a retrial. The defence counsel raised the issue of bail and the decision was made to remand the appellant in custody. However, Kay LJ stated:

'this ought to be tried as soon as possible. I think the only thing to say, Mr Wall, is of course that we have ordered a retrial....By ordering it, we do not say one has to take place. That is a matter for the prosecution so, for the avoidance of doubt make that clear. Enquiries will be made and the Crown can consider what it wants to do. As far as we are concerned, on what we know about it, we simply order a retrial'⁵⁶⁸

It would appear from this that the Court is merely suggesting that a retrial take place and that the Court had sympathy with the appellant's counsel, Mr Wall. It leaves open to question whether a retrial does actually take place in relation to every one ordered as this would imply that the prosecution are then able to decide whether they want to pursue it.

There were a number of judgments where retrials were ordered with no discussion which shows that the Court does not always require the prosecution to make a request and the defence to argue against it. This happened in *R v Ram*,⁵⁶⁹ *R v Lang*,⁵⁷⁰ and *R v J*.⁵⁷¹

⁵⁶² [2002] EWCA Crim 1388.

⁵⁶³ [2002] EWCA Crim 613.

⁵⁶⁴ [2002] EWCA Crim 532.

⁵⁶⁵ [2002] EWCA Crim 774.

⁵⁶⁶ [2002] EWCA Crim 1194.

⁵⁶⁷ [2002] EWCA Crim 372.

⁵⁶⁸ *Ibid*, para. 60.

⁵⁶⁹ [2002] EWCA Crim 372.

⁵⁷⁰ [2002] EWCA Crim 298.

⁵⁷¹ [2002] EWCA Crim 1218.

With such a small sample of judgments it is difficult to draw many conclusions in terms of why a retrial would be ordered. The Court clearly assesses the seriousness of the crime and the more serious, the more likely that one will be ordered. The Court is also weighing up arguments from counsel in relation to the length of the sentence given to the appellant and how much was served; the extent to which witnesses are likely to turn up and the time it will take for the retrial to take place. The discussion in relation to retrials is not always stated in the judgment and it seems that the prosecution have a large role to play in requesting the retrial in the first place. Cases such as *Round* show that the prosecution also has a large role to play in deciding whether the retrial actually takes place as it may be that the Court orders one which is not then followed through by the prosecution. The cases where retrials were mentioned and not ordered will now be discussed.

Retrials discussed but not ordered

In some cases a retrial is not going to be practically possible as the fact that it is a retrial may have implications if there are other charges and it may cause problems if the jury is not to know there is a retrial. In *R v GB*,⁵⁷² some of the arguments had been rejected and this would cause problems if the appellant was retried. The Court considered that the appellant would not be able to have a fair trial because of this and because 'we cannot be sure that he would. We are prepared, therefore, to take the risk that he would not.'⁵⁷³ The Court decided it would not be in the interests of justice to order a retrial. The Court appears to be taking a liberal approach here in relation to the appellant but this also highlights that a retrial is not always a practical option.

One of the problems with the delay in hearing appeals against conviction as outlined in chapter four, is that appellants may have served their sentence so a retrial is not desirable. This was a factor in cases in the sample such as in *R v RF*,⁵⁷⁴ where the Court did not order a retrial but stated 'we emphasise that the determination of where the truth lies, in a matter of this kind, is not one for this Court. It is a matter, invariably, for a jury.'⁵⁷⁵ In *R v Khan and others*,⁵⁷⁶ Kay LJ stated:

'If this appeal had taken place within a short time of the conviction of the appellants we would have thought that this was exactly the sort of matter that ought to have resulted in a retrial, so that a trial could take place in which the jury had before them the relevant evidence and were able to consider themselves the competing suggestions on a proper basis.'⁵⁷⁷

⁵⁷² [2002] EWCA Crim 1483.

⁵⁷³ *Ibid*, para. 37.

⁵⁷⁴ [2002] EWCA Crim 633.

⁵⁷⁵ *Ibid*, para. 44.

⁵⁷⁶ [2002] EWCA Crim 945.

⁵⁷⁷ *Ibid*, para. 47.

There was also a similar issue in a number of cases, for example in *R v H*,⁵⁷⁸ *R v Hart*,⁵⁷⁹ *R v G*,⁵⁸⁰ *R v Logiudice*,⁵⁸¹ *R v Fox*,⁵⁸² and *R v Blakeney*.⁵⁸³

It would appear that the Court may refuse to order a retrial if it does not approve of the behaviour of the prosecuting authorities. In *R v Higgins*,⁵⁸⁴ the appellant was convicted of robbery. The conviction was quashed on the basis of non disclosure of witness statements that had not been handed over to the defence under the disclosure provisions. The Court clearly had issues in this case with the police officer responsible for disclosure. With regard to the retrial, Kay LJ stated:

'The further issue is that Mr Price, on behalf of the prosecution, invites us to order a retrial. In normal circumstances we would unhesitatingly do so. This is a serious matter, and if a fair trial was possible the public are entitled to have this matter properly investigated. Our conclusion is that, in the light of everything we have been told about this matter, no fair trial is now possible. No one with the history that we have related could ever be sure that other aspects of the evidence had not become tainted. In those circumstances, we think that it would be wrong to order a retrial.'⁵⁸⁵

It would appear that the Court in this case felt that the evidence had been deliberately withheld from the defence. This meant that the police could no longer be trusted to investigate the case properly. A similar issue arose in *R v Brignall*, *R v Barnes*.⁵⁸⁶ In this case one of the police officers was on trial for conspiracy to pervert the course of justice relating to another matter. It was argued on appeal that the police officer was no longer a witness of truth and the conviction should be quashed. The Court decided it was unable to order a retrial in light of this as the police officer had been the main prosecution witness in the case. Both these cases appear to be an acknowledgement of the supposed corrupt behaviour of the police officers involved which has led to the impossibility of a retrial not being tainted by that behaviour.

The other cases showed a variety of reasons in refusing a retrial. In *R v Jones*,⁵⁸⁷ the prosecution applied for a retrial and the defence counsel stated that he conceded that this was a category of case where a retrial in the interests of justice has to be considered but he argued that there should not be a retrial on account that this would be the third trial. This case is illustrative of the problems of the Court increasing the use of retrials. The more that are ordered then the Court may see an increase in those

⁵⁷⁸ [2002] EWCA Crim 399.

⁵⁷⁹ [2002] EWCA Crim 591.

⁵⁸⁰ [2002] EWCA Crim 550.

⁵⁸¹ [2002] EWCA Crim 929.

⁵⁸² [2002] EWCA Crim 1242.

⁵⁸³ [2002] EWCA Crim 391.

⁵⁸⁴ [2002] EWCA Crim 336.

⁵⁸⁵ *Ibid*, paras. 19-20.

⁵⁸⁶ [2002] EWCA Crim 569.

⁵⁸⁷ [2002] EWCA Crim 287.

returning to the Court on appeal who were convicted on a retrial. The Court then has to make the decision, as in this case, whether to order a further retrial. This has the potential to reduce the number of retrials if the Court takes the view it is unfair to try the appellant again but this may be the result of the Court's attitude to ordering more retrials. In *R v Bains*,⁵⁸⁸ the appellant was convicted of rape. The appeal was allowed because the complainant had misled the jury about her relationship with another man. The other man had died. The prosecution requested a retrial in this case but this was refused by the Court with Tuckey LJ stating:

'We do not think there should be a retrial in this case. The complainant's credibility has been irreparably damaged by the misleading evidence which she gave at the trial and by the fact that she made two statements in which she lied to the police. The other man will not be able to give evidence at the retrial and so the fact that he lied will not be before the jury. In those circumstances it would be wrong for us to expose the appellant to a further retrial. Our view is supported by the fact that this appellant is now 74 and has already served the equivalent of a 30 month sentence; although if those two factors were all that stood between him and a retrial they would not be conclusive.'⁵⁸⁹

This could be viewed as the appeal court not believing the complainant and refusing to order a retrial on that basis. This would contradict the *Pendleton* principle, as discussed in chapters 5 and 6, where the Court should not form a view of the credibility of witnesses as that is the task of the jury. It would appear here that the Court is saying the complainant is no longer a believable witness when the contrary view to that is that the Court should order a retrial and allow the jury to determine that for itself. In *R v Cakmak* and others,⁵⁹⁰ there was a detailed discussion of whether to order a retrial. The appellants were convicted of threatening criminal damage after they took over one of the pods on the London Eye to protest. The appeal was allowed after the judge misdirected on the particulars of the offence. The prosecution sought a retrial as there were others who were yet to be tried for the same offence. In the prosecution's view they could all be tried together. Kennedy LJ pointed out the problem for the prosecution which was if there was no retrial, those yet to be tried could use this case as an illustration of them being acquitted but if a retrial was ordered then the matter would remain to be considered on another occasion which would not be so useful to the others. The Court declined to order a retrial with the caveat that 'we do, however, make it clear that if anything is said about the proceedings in relation to the current appellants those proceedings must be properly explained. In other words, that they were convicted in the crown court and succeeded on appeal in relation to the direction given by the judge to the jury.' This case shows that a retrial has implications not only for the appellants but also for others involved in the case.

⁵⁸⁸ [2002] EWCA Crim 83.

⁵⁸⁹ *Ibid*, paras. 6-7.

⁵⁹⁰ [2002] EWCA Crim 500.

Again, from such a small sample of cases it is difficult to draw any conclusions but it would appear that the main reason for not ordering a retrial is that the appellant has already served the sentence. This is possibly down to the length of time it takes to appeal. These cases also show that the Court may refuse to order a retrial when it does not approve of the behaviour of the prosecuting authorities. This is partly due to the fact that the case has become so tainted that the evidence is no longer believable but there may also be an element here of punishment for those authorities as a mark of the Court's disapproval. That may also apply to witnesses or complainants in the case if the Court appears not to believe them as in *Bains*. Whilst it is not the role of the Court to take a view of the believability of complainants, it may be that it does and decides not to order a retrial on that basis.

The position after 2002 will now be discussed.

The Court's approach to retrials after 2002

The number of retrials ordered after 2002 continued to be high after a dip to 53 in 2003. In 2004, the number was 66, in 2005, it was 77 and in 2006, it was 58. The figure of 77 in 2005 was the highest number since the law changed in 1988. There were 228 appeals allowed that year which meant that there were retrials ordered in 34% of the appeals allowed. In 2006, this figure was 32%. A analysis of the retrial cases after 2002 from *Casetrack* provides us with further details of when a retrial will be ordered in addition to the ones above.

The Court gave some indication of the procedure relating to retrials in *R v Jacques*.⁵⁹¹ This was an interesting judgment because the Court stated it had been unable to reach a decision and needed some more time. Potter LJ stated that 'one is always anxious to avoid the necessity for counsel to attend if necessary. Let us suppose for a moment that we were in favour of ordering a new trial, which is what would be the effect of a decision favourable to the appellant, is it something that the Crown would in fact proceed with, bearing in mind that he has served a large part of his sentence?'⁵⁹² Counsel for the prosecution said that it would be unlikely to on account that he had served his sentence. Potter LJ stated 'if that is the result, in the ordinary way one would have to invite counsel to make submissions on the question of a new trial.'⁵⁹³ The above cases and this case appear to suggest that the Court will only consider ordering a retrial if the prosecution counsel ask for it to be considered. This would appear to suggest that if the prosecution does not request one, the Court does not consider it. Therefore, the increase in retrials

⁵⁹¹ [2003] EWCA Crim 100.

⁵⁹² *Ibid*, para. 4.

⁵⁹³ *Id*.

may be the result of the prosecution asking for more though there are cases where the Court orders a retrial without any discussion with the prosecution as discussed above.⁵⁹⁴

It would appear that the Court is not supposed to use its retrial power to punish the prosecuting authorities. In *R v Prosser*, *R v Chandler* and *R v Henderson*,⁵⁹⁵ the appellants were convicted of conspiracy to deal with proceeds of drug trafficking or criminal conduct. The appellants were sentenced to a term of imprisonment plus confiscation orders. The grounds of appeal related to non-disclosure of evidence. The prosecution did not oppose the appeal and the Court quashed the convictions. On the subject of a retrial, the Court went through the criteria as outlined by Lord Bingham in *R v Graham*.⁵⁹⁶ The appellants had served most of their sentences but if the retrial was not ordered they would have the money returned to them that had been confiscated. The Crown submitted that the public have a proper interest in seeing that those who have committed serious crime do not benefit from their crime and the public ought to know by way of a retrial whether or not these were offenders who committed serious crime and who ought therefore to be deprived of the proceeds of that crime. They submitted that the appellants would be able to have a fair trial as the documents had now been disclosed to the defence. Counsel for the appellants argued that as the prosecution had been responsible for the non-disclosure, they should not be allowed the opportunity to start again. The Court reviewed the case for both sides and a retrial was ordered as in Kay LJ's view the appellants should not be able to profit from their crimes if they were guilty because if a retrial was not ordered the money would have to be returned. This case can be contrasted with Kay LJ's views in *Higgins* above⁵⁹⁷ which also involved non-disclosure of evidence where he refuses to order a retrial because a fair trial would not be possible as a result of the behaviour of the police. It seems in that case there is an element of punishment in refusing to order a retrial which contradicts his views in this case.

It would appear that there are occasions where a retrial is not ordered as the Court feels the appellant did not commit the crime. In *R v Iqbar*,⁵⁹⁸ the appellant was convicted of wounding with intent after the victim had been hit over the head with a vodka bottle. On appeal, the appellant said that at some point before the jury retired, his brother, Nasif, had visited him to say he was the one who had done it. The appeal court heard the evidence of his brother who said it had been him. The Court felt that the brother was not 'an impressive witness' but 'in other respects it has to be acknowledged that what he was saying on his oath would undoubtedly put him at risk of prosecution either for the assault or for perjury, one or the other. It would appear to this court to be inconceivable

⁵⁹⁴ See, for example, *R v O'Leary* [2006] EWCA Crim 3222.

⁵⁹⁵ [2003] EWCA Crim 1067.

⁵⁹⁶ See above, n. 557.

⁵⁹⁷ See above, n. 584.

⁵⁹⁸ [2003] EWCA Crim 989.

that should the appeal be allowed the prosecuting authority would not proceed against Nasif for this very serious offence.⁵⁹⁹ The conviction was quashed and prosecution counsel requested a retrial because the CPS did not accept the brother's version of the events. The judges were clearly aghast at this and Mantell LJ stated 'one despairs.'

It appears in this case that the retrial was refused as the Court clearly believed that the witness they had just heard the evidence from had committed the crime. This shows the problems for fresh evidence appeals where the Court takes a view on whether it believes witnesses or not. This usurps the role of the jury but is inevitable in fresh evidence cases. Instead of sending the case back to the jury for retrial where the brother's evidence could have been considered by the jury, the Court decides not to order a retrial because it clearly disagrees with the prosecution position. It would appear that the conviction is quashed because the Court considers the appellant to be factually innocent. This does, of course, benefit the appellant and is to be welcomed if the brother committed the crime but it does show that the Court can usurp the jury when it wants to. It could be argued that it should do this more often and perhaps more factually innocent appellants would have their convictions quashed.

In *R v Crump*,⁶⁰⁰ the Court appeared to take the opposite view. The Crown requested a retrial which was opposed by the defence on the grounds that he had served three months of a three year sentence. In response, Kay LJ stated:

'We cannot accept that that is so. This is a serious matter. Any offence that ends in death has to be treated by the courts as a matter of real significance. Here the appellant was convicted on evidence that many might think was strong evidence of the commission of this offence. The fact that there was the defect in the summing-up properly leads to a conclusion that the conviction is not safe but it should not bring an end to the proceedings altogether.'⁶⁰¹

It would appear in this case that the Court is potentially ordering a retrial because it thinks the appellant is guilty and does not want him 'getting off on a technicality.' This may be an illustration of why the Court is ordering more retrials as this may be an example of where previously the Court would have just upheld the conviction. One of the categories of decision making in relation to procedural irregularity appeals is the Court upholding the appeal where they consider there is strong prosecution evidence so this could be an example of a new approach to retrials. A similar case was *R v Quinn*.⁶⁰² The appellant was convicted of actual bodily harm and argued self-defence. He was a police officer with a physical condition which meant he had pain in his neck and shoulder

⁵⁹⁹ *Ibid*, para.6.

⁶⁰⁰ [2004] EWCA Crim 894.

⁶⁰¹ *Ibid*, para. 14.

⁶⁰² [2007] EWCA Crim 1088.

which limited his movements. One of the jurors at the trial had told someone else that she had seen the appellant getting into the lift and it appeared he was not as incapacitated they were led to believe. The other person had rung the appellant's solicitors to tell them. The Court quashed the conviction and discussed a retrial which the prosecution requested. The defence argued there should not be one and His Honour Judge Stewart stated 'there is nothing to indicate that he can no longer have a fair trial by virtue of the passage of time, is there? It is a simple incident. So why is it not in the public interest that this man be prosecuted when there is self evidentially evidence that he is guilty of the offence?'⁶⁰³ The Court ordered a retrial. The Court appears to take the view that the appellant is guilty and disbelieves the defence of self-defence which is usurping the jury's role once again. However, the fact that the Court orders a retrial emphasises that it is the role of the jury to determine the issue and not the Court.

An analysis of all these cases provides a fairly clear picture of the procedure and issues around when a retrial will be ordered. In most cases when the appeal is allowed, the prosecution will be invited by the Court to make a submission as to whether it is inclined to ask for a retrial. There is then usually a discussion from both prosecuting and defence counsel as to whether a retrial should be ordered along the lines of that specified by Lord Bingham in *R v Graham*. The Court is weighing up such factors as the seriousness of the offence, the time the appellant has served, the time of the events, the time of the original trial, whether the witnesses would be available to give evidence, whether a fair trial is possible, the age of the appellant, the reason why the conviction was quashed, the credibility of witnesses, the implications on co-accused, the length of the retrial, the quality of the evidence and whether it is in the interests of justice taking into account the public. This list is not exhaustive but it does give an indication of the number of factors the Court considers in these cases.

It is clear from the judgments that the Crown is not obliged to continue with the retrial when one is ordered. There are judgments where if the Crown counsel is not sure of whether the CPS will pursue a retrial and needs to take further instruction, the Court will order the retrial anyway and leave it to the CPS as to whether they proceed. In this sense, whilst these cases provide us with examples of the circumstances in which they were ordered, it is then not clear in how many of those cases the CPS prosecutes. What is also clear is that by the time the conviction has been quashed, many of the appellants have already served their sentences. This is not a determinative factor as the Court has ordered the retrial of someone who has served their sentence but it does imply that if there was not such a delay in appealing then more retrials could be ordered.

⁶⁰³ *Ibid*, para. 30.

There were also problems considered in the judgments of the victims and witnesses having to appear in court again. This seemed to be one of the major considerations for the Crown when deciding whether to either ask for a retrial or proceed with the retrial. This is also a factor for the Court when deciding whether to order one. It can be traumatic for a witness to have to testify again and there are also implications for the quality of the evidence which may have diminished over time, particular the memories of witnesses. The appellant may be at a distinct disadvantage second time round because of the time since the offence and it does seem to be a factor in deciding whether to order a retrial whether the appellant will get a fair trial.

What is not overly clear though is why there has been such a rise and also why in the vast majority of cases, a retrial is not even discussed. Although the rise in retrials at the beginning of the 1990s was seen to be an illustration of a supposed more liberal approach, the ordering of a retrial is not necessarily evidence of this. If the conviction would have been upheld previously, then this is evidence of liberalism as at least the appellant has the opportunity of an acquittal second time round. But if the conviction would have been quashed previously and a retrial not ordered then this is evidence of a stricter approach. The rise is not easily explained by an increase in convictions allowed. The more convictions that are quashed the more the possibility of a retrial increases. But in 1999, for example, a relatively low number of appeals were allowed (171) but there were seventy retrials ordered which is 41%, so the rise is not necessarily linked to an increase in appeals allowed as, as was discussed in chapter four, there has been a steady decrease in the number of appeals allowed since 1995.

It has been suggested that one possible argument for the greater use of retrials is the court rectifying unfairness on appeal. This is potentially as a result of the HRA. Nobles and Schiff, for example, have suggested that if the Court is increasingly remedying defects on appeal, this is more likely to result in a retrial being ordered when the conviction is quashed rather than it being quashed outright (Nobles and Schiff, 2001, p. 915). This would appear to suggest that the Court is willing to quash the conviction as a result of the irregularity to uphold the integrity of the system but is preferring to send the case back for retrial. Whilst the quashing of the conviction may indicate a less strict approach to the procedural irregularity, this can be countered by the retrial ordered.

Ormerod and Taylor have suggested that 'given the power of retrial, it is arguable that the optimal solution is for the Court of Appeal to favour ordering retrials so that the restoration of legitimacy is transparent' (2004, p. 278). This appears to be suggesting that as the Court is a review court, and not a retrial court, it is more legitimate for the Court to send the case back to the jury for retrial than it be seen to be deciding issues for itself. In this way, the jury remains the primary decision maker which makes the

process legitimate as the Court is then acting as a review court. But the problem here is if the irregularity has impacted on the fairness of the trial and the correctness of the verdict then it is legitimate to send the case back to the jury so they can decide again without the element that led to unfairness. But this is more complex on an abuse of process argument. If it is within the Court's role to uphold the integrity of the criminal justice system then quashing a conviction because of an abuse is the Court's way of marking its disapproval of what happened, even if it thinks the appellant is guilty. Therefore, in those cases the Court is acting in accordance with what its role is which is independent of the jury and involves assessing the irregularity, which the jury never knew about, and deciding whether it was so serious that it made the conviction unsafe. By sending the case back for retrial this is enforcing the deference to the jury in circumstances where deference is not required. If the behaviour that resulted in the conviction was so reprehensible that it is deserving of the conviction being overturned then this sends a message from the Court that it is unacceptable. But if the Court then orders a retrial, this somehow detracts from the message that the Court should be sending and allows the prosecution to try again when it may have been responsible for the conviction in the first place using underhand tactics. This is illustrated by the defence argument in *R v Prosser, Chandler and Henderson* above.⁶⁰⁴ The appeal was allowed on the basis that the prosecution had withheld information and the defence argued they should not be allowed to gain by the retrial. The Court made a point of saying that it should not refuse a retrial to punish the prosecution as the public deserved that serious crimes should be tried but if the conviction is being quashed on the basis of moral legitimacy or integrity, it seems central to that that the conviction remains quashed and the legitimacy is not diluted by sending the appellant back to be retried.

If the Court is ordering more retrials because it is now remedying more unfairness then this is of benefit to the appellant if these were previously convictions that would have been upheld. In that sense the Court would be focusing more on the grossness of the violation which is what Ormerod and Taylor argued would be a more principled approach after the enactment of the HRA. But as Ormerod and Taylor suggest, the Court's review function seems at odds with this new expansion of decision making. It seems it is much more the role of the Court to decide on issues of rights, fairness, legitimacy and integrity and the Courts deference to the jury, because of its review function, may be hampering the Court in overturning these convictions. This potentially explains the lack of these convictions being overturned in the 2002 sample. If the 2002 sample is an indication of how the Court is deciding appeals based on these issues, it would appear that the rise in retrials cannot be attributed to the Court remedying the defect itself as the Court is not quashing the convictions so retrial issues are rarely being considered.

⁶⁰⁴ See above, n. 595.

Summary

Both the 1990 and 2002 samples show that the Court is certainly ordering more retrials. The rise in the number since 1995 has been considerable and has remained relatively high. This is not necessarily down to an increase in appeals allowed as the graphs show these have been steadily decreasing. But the reason for the increase is not easily identifiable.

What is clear from the judgments, is the factors the Court is considering as outlined above. The ordering of a retrial appears to largely depend on the prosecution requesting one as there were very few retrial judgments where the Court ordered one without a request. The rise may be attributable to the prosecution requesting them much more than it used to. This may reflect pressure on the CPS to convict rather than be attributable to a more liberal approach on the part of the Court. If the CPS is requesting more then this is giving the judges the opportunity to order more and may provide an explanation.

What is not clear though is why in the majority of cases a retrial is not ordered. Those cases where one was ordered do not appear to be significantly different from those where it was not even considered. In this sense, the 2002 sample confirmed Malleson's findings. Whilst there are many cases where a retrial is not possible for one reason or another, the lack of any retrial discussion in these cases is puzzling. This means there are large numbers of appeals being allowed without any possibility of a retrial which shows that whilst the number may be increasing it is not central to the Court's decision making in the majority of appeals.

It is difficult to say whether the rise in retrials is to be welcomed. If these are convictions that would have been previously upheld then the increase in number is beneficial to the appellant as the appellant may be acquitted second time round. But if these were appeals that would have just been quashed previously then this is not so beneficial to the appellant. What is clear is that there seems to be a rise in the number of appeals which have come from a retrial. This impacts on the Court because the more that are ordered, the more there is a possibility that that conviction will be appealed. This increases the workload of the Court. This also has implications for the ordering of a retrial on the second appeal as it may be unfair to try the appellant again. What is also clear is that there are many appellants who have served their sentence when the conviction is finally quashed. This impacts on the ability of the Court to order a retrial. The longer it takes to appeal, the more unlikely the retrial is. Therefore, by implication, if the appeal was a speedier process, then more retrials would be ordered.

Whilst the retrial power may appear to be the solution to many of the problems of the Court, the reality is it is only considered in a small number of cases and it is only possible in a small number of cases. Therefore, the problems identified in this thesis are not necessarily solved by the use of a retrial. The problems of the Court's decision making means it upholds the majority of appeals so the opportunity to order a retrial is fairly rare. A solution may be, which was suggested by Malleson, to give the Court the power to order a retrial as an alternative to quashing the conviction which may mean the Court is more conducive to sending cases back to the jury. If the Court is being too restrictive in overturning convictions, this would solve the problem of the Court having to quash the conviction first which may mean it is more inclined to order a retrial rather than upholding the conviction. But this would not necessarily solve the problem where retrials are not practicable and then we are left with the same problem of the Court's decision making. Therefore, the solution to the Court's decision making problems is not necessarily found in the use of retrials, it has to lie with changes to the decision making process itself.

In chapter nine, the general issues of the thesis will be discussed. The evidence to show a liberal or restrictive approach will be outlined in order to assess whether the CAA 1995 has had any impact on the Court's decision making process. Finally, proposals for reform will also be discussed.

CHAPTER NINE: CONCLUSIONS

A very brief analysis of the history of miscarriages of justice was carried out by Lord Steyn in the House of Lords case of *R v O'Conner and another* and *R v Mirza*.⁶⁰⁵ He stated that:

'Nowadays we know that the risk of a miscarriage of justice, a concept requiring no explanation is ever present. In earlier times courts sometimes approached the risk of a miscarriage of justice in ways which we would not nowadays find acceptable.'

He referred to the fact that in 1980 the Court of Appeal denied the Birmingham Six the right to sue the police in civil proceedings citing Lord Denning MR's now infamous comment that 'this is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further.'⁶⁰⁶ He also referred to Lord Devlin's comment that the cases of the Birmingham Six, the Maguire Seven and the Guildford Four were 'the greatest disasters that have shaken British justice in my time' (Devlin, 1991).

Lord Steyn referred to the RCCJ and the setting up of the CCRC and made reference to 'a more general change in legal culture' citing the case of *R v Secretary of State for the Home Department, Ex p Simms*⁶⁰⁷ where, 'in the face of some 60 miscarriages of justice in the 1990s, the House of Lords set aside Home Office instructions denying prisoners access to journalists in their efforts to get their convictions overturned.' In Lord Steyn's view:

'The philosophy became firmly established that there is a positive duty on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right. In the world of today enlightened public opinion would accept nothing less. It would be contrary to the spirit of these developments to say that in one area, namely the deliberations of the jury, injustice can be tolerated as the price for protecting the jury system.'⁶⁰⁸

In contrast, the former chairman of the CCRC, Professor Graham Zellick, has recently stated that appeal judges are failing to correct miscarriages of justice where they suspect the jury has come to a wrong verdict.⁶⁰⁹ He has argued that the Court of Appeal (Criminal Division) ought to be more active in quashing convictions even though there has not been any irregularity in the trial process and that 'the Court of Appeal is even more reluctant in 2008 than in the 1990s to quash convictions because they think they are unsafe' as 'we are more deferential to a jury now than in the 1990s when things

⁶⁰⁵ [2004] UKHL 2

⁶⁰⁶ *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, at 323D

⁶⁰⁷ [2000] 2 AC 115

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *The Independent*, 27 September 2008.

were going wrong.' He stated that 'we know from bitter experience that juries get things wrong' and that when he had raised this argument with members of the judiciary he had been admonished for asking judges to second-guess the jury. He stated 'they tell me that in this country we have trial by jury, so who are they to go behind the verdict of the jury which has seen all the evidence?' Zellick has been chairman of the CCRC for the last five years so is in a very good position to judge the working practices of the Court of Appeal.

This thesis has essentially used Kate Malleson's study for the RCCJ and the more recent judgements of the Court to examine the changes to the Court of Appeal's powers in the Criminal Appeal Act 1995 to show which of these diametrically opposed views is correct. This has required an analysis of whether the Court has moved away from an appeal process 'where injustice can be tolerated as the price for protecting the jury system' or whether it is more deferential to a jury now than in the early 1990s and the problems that caused.

This study has not sought to determine in any reliable statistical terms, whether the CAA 1995 has changed the way in which the Court makes its decision as compared with Malleson's findings in 1990. In order to make such claims, the research would have had to have been constructed in a way that would permit a more sophisticated analysis including the use of multiple regression tests. This form of analysis would have assisted in determining whether other intervening factors between the two studies, may have had a greater effect of any perceptible change in Court of Appeal decision making, than the introduction of the CAA 1995 and the change in the test used to determine the lack of safety of the conviction. However, this study does provide an indication of the ways in which the Court of Appeal's decision making has changed since the introduction of the 1995 Act and may serve as a basis for future quantitative analysis that attempts to verify or reject these tentative hypotheses. This chapter will evaluate the findings from chapters 4, 5, 6, 7 and 8 to assess whether Lord Steyn's view is correct or whether Graham Zellick's view is correct. It will also propose reforms.

The evidence that the Court has adopted a more liberal approach as a result of the changes in the law is contradictory.

Evidence of a more liberal approach?

In order for Lord Steyn's view to be correct there would have to be evidence that the Court was now more willing to rectify injustice than it had been previously. This would presumably mean there was less deference for the jury and more convictions overturned. As discussed in this thesis, in the early 1990s the Court was supposedly taking a more liberal approach which is illustrated by the quashing of the convictions of

the Guildford Four and the Birmingham Six. Therefore, as discussed in chapter one, the recommendations of the RCCJ and the changes in the law were supposed to restate the current existing practice of the Court in this liberal approach. The aim of the research conducted for this thesis was to evaluate whether there had been any changes to the Court's approach. If this identified a more liberal approach then the aims behind the changes in the law would have been achieved and Lord Steyn would be correct. But if not then Graham Zellick would be correct. Therefore, for the purposes of this chapter we need to review the research to see whether there is evidence that a more liberal approach has been adopted.

The first indicator of a more liberal approach would be the success rate of appeals against conviction. As discussed in chapter four, in 1990 there were 256 appeals allowed which was 42% of the appeals heard by the Court. In 2002 this figure had gone down to 34% and in 2006 this figure had gone down further to 32% (see Graph 4.1). Therefore, if we are measuring the Court's practices on the basis of how many appeals were allowed, it would appear that it has got more restrictive.

The second indicator of a more liberal approach is the number of leave to appeal applications granted. In 1990, this figure was 31% with 1705 applications but this had gone down to 23% in 2002 with 1914 applications but had risen to 26% in 2006 with 1596 applications. Therefore, it could be argued that whilst a more restrictive approach was adopted between 1990 and 2002, this has liberalised in more recent years.

The third indicator of a more liberal approach is the Court's approach to fresh evidence grounds. The 1990 sample had twenty-three fresh evidence grounds and the 2002 sample had thirty-six which is potentially evidence that more fresh evidence appeals are getting through the leave filter. But ten of these appeals were CCRC referrals that do not need to go through the leave filter. This would leave a truer comparison of twenty-six appeals in 2002 but this is still more than in 1990 so possibly slight evidence of a more liberal approach. The 1990 sample had four appeals allowed and the 2002 sample had nine appeals allowed. Again, this is potentially evidence of a more liberal approach but could simply correspond with the rise in the number of grounds. The percentage of fresh evidence grounds in the 1990 sample was 7% and it was 6% in the 2002 sample. Therefore, whilst the number of grounds generally had almost doubled in the 2002 sample, the number of fresh evidence grounds as a proportion had decreased. This shows that fresh evidence grounds were still very rare in 2002. Further evidence against a liberal approach is that in 1990 the evidence was admitted in 61% of cases and in 2002 that figure was 50% of cases. This shows that despite the rise in the number of grounds, the Court is potentially more restrictive in the evidence it hears.

An indication of a more liberal approach is that in five cases in the 2002 sample the Court heard the fresh evidence '*de bene esse*.' This is where the Court hears the evidence without the requirement of section 23 of the CAA 1968. The cases in the sample where the evidence was rejected show that the Court uses section 23 to reject the evidence. Therefore, if the Court hears the evidence without considering section 23 it is then considering whether it made the conviction unsafe so it has passed the difficult hurdle of at least being heard in the first place. It is not clear why the Court chose to do this in these cases and not in the others but if the Court adopted this approach to all fresh evidence appeals then there could be more chance of the conviction being overturned.

The fourth indicator of a more liberal approach is the Court's approach to lurking doubt appeals. In the 1990 sample there were 10 lurking doubt type cases and in 2002 there were seven. It would appear therefore, that the hope of the RCCJ that the Court would liberalise its approach to these appeals has not materialised. In the 1990 sample, six out of the ten appeals was successful whereas in 2002, only one out of the seven was successful. It would appear that the Court's supposed liberal approach was not encapsulated by the CAA 1995 in relation to these appeals. The numbers are so small that it is difficult generally to gather information about these appeals.

It is also difficult to do a qualitative analysis of these appeals due to the small number of them and due to the fact these grounds are often argued with others so do not necessarily have a decision making process that is pertinent to them. These cases are the most problematic for the Court because they are essentially requiring the Court to make its own subjective view of the evidence which it clearly does not very often. But the 2002 sample has shown that the lurking doubt concept has survived the safety test and has appeared to be reinforced by *R v B*, after 2002, albeit in a different language. The fact that there are cases that have been quashed evoking this ground shows that the Court is able to do it when it wants but it really does not do this very often. The Court's deference to the jury verdict and its review function certainly seems to be a major factor causing the Court to appear be restrictive with these appeals.

The fifth indicator of a more liberal (or at least less strict) approach is the Court's approach to procedural irregularity appeals. These were more problematic to do a comparison with because the 1990 sample does not contain much analysis of these appeals other than the application of the proviso to them. Also, these appeals have been reinforced and added to by the Human Rights Act which was enacted in 1998. So the majority of the data comes from the 2002 sample though it was possible to do a qualitative comparison between the two samples.

In the 1990 sample, of the 271 procedural irregularity grounds 88 were allowed which equates to 32%. In the 2002 sample, of the 590 procedural irregularity grounds, 58 were allowed which equates to 10%. This is a very low figure and is certainly not evidence that the Court has adopted a more liberal approach, despite the enactment of the HRA. It also shows that increasing the number of grounds does not necessarily result in more success. When comparing the three most common grounds in the samples – misdirection on the law or evidence, defective or unbalanced summing up and evidence wrongly excluded or included, they all show there were more appeals allowed in the 1990 sample than the 2002 sample. In the 1990 sample, 77 (40%) of these grounds were allowed or leave granted with 115 (60%) dismissed or refused. In the 2002 sample, 57 (18%) of these grounds were allowed or leave granted with 256 (82%) dismissed. This shows that fewer appeals were allowed in 2002 with these grounds despite the huge rise in the number of grounds generally.

For those that hoped the Human Rights Act would bring about a new liberalisation to the Court, the evidence is contradictory as to whether this has been achieved. At first glance, it may appear that it has not made any difference to the Court's approach. All the human rights grounds were dismissed by the Court along with all the abuse of process grounds. But the HRA has given appellants new avenues of argument and the Court used the terminology 'fair trial' when quashing a small number of convictions so that is evidence that the language of the HRA is being used which is of benefit to the appellant. Whilst this terminology is not new for the Court, it is at least now being used regularly.

It would seem though that despite the hopes of some after the HRA that the Court would adopt a new approach to deciding the appeal, which would focus on the seriousness of the irregularity and not the appellant's guilt, the Court is still focusing on the guilt of the appellant to determine the appeal. This is illustrated by the categories of decision making and the sheer number of appeals dismissed or refused. When the Court is deciding that there was an error but it was too minor or there was strong prosecution evidence, it is fairly clear from these judgments that the Court is forming a view of the guilt of the appellant. And in the vast majority of appeals the Court disagreed that the error had occurred. Therefore, if we are measuring the value of due process in the number of appeals overturned, the Court is taking a strict approach in procedural irregularity appeals despite the enactment of the HRA.

But if we broaden out the discussion of the value of due process to one that is not just about overturning convictions, we may find some evidence of a less strict approach. To just focus on overturning convictions would negate the contribution the Court makes to the system of precedent and the value of the judgment in terms of arguments that can be made in later cases based on what the judges say. As discussed in chapter seven,

there were judgments where valuable points of principle were stated such as in *R v Rodger*, where it was decided that interviews of suspects without a caution should have been excluded, in *R v Mason* where it was said that covert taping was a breach of Article 8, and in *R v Thomas* where it was said if there was tension between unfairness and safety then this would enable the Court to depart from a previous decision even where it was considered there was no new evidence or argument. There were also judgments where the Court made declarations that specific laws were compatible with the ECHR. Whilst all these convictions were upheld, these were all statements that were good precedents for others to follow. So it could be argued that there was evidence of a less strict approach though that was more difficult to find. It would appear that, once again, the Court's deference to the jury and its review function was very much at play in these judgments.

The final indication of a more liberal approach is the Court's retrial power. This was the easiest of all the powers to assess any changes. In the 1990 sample there were 2 ordered and 3 discussed but not ordered and in 2002, there were 12 retrials ordered and a further 14 discussed but not ordered. As graph 8.1 showed, the number of retrials has remained high since 2002. This rise is not just explained by more appeals being allowed and therefore more opportunities for retrials as the number of appeals allowed has continued to fall since the mid 1990s. But it is not easy to see why there should be such an increase in their use.

On the one hand it could be argued that the ordering of more retrials is evidence of a more liberal approach. If these are appeals that would have been previously upheld then being retried is preferable to having the conviction upheld because at least there is a chance of an acquittal on the retrial. But if these were convictions where previously the conviction would have been overturned without ordering a retrial then sending the appellant back to stand trial would be more restrictive.

Whilst the retrial may appear to be the solution to many of the problems of the Court, the reality is it is only considered in a small number of cases and it is only possible in a small number of cases. Therefore, the problems identified in this thesis are not generally solved by the use of a retrial. The problems of the Court's decision making means it upholds the majority of appeals so the opportunity to order a retrial is fairly rare. A solution may be, which was suggested by Malleson, giving the Court the power to order a retrial as an alternative to quashing the conviction which may mean the Court is more conducive to sending cases back to the jury. But this would not necessarily solve the problem where retrials are not practicable and then we are left with the same problem of the Court's decision making. Therefore, the solution to the Court's decision making

problems is not necessarily found in the use of retrials, it has to lie with changes to the decision making process itself.

As the above shows, the evidence to suggest the Court is adopting a more liberal approach now than in the early 1990s is not exactly convincing or authoritative. And any evidence to suggest it is easily contradicted by pointing to evidence of a more restrictive attitude. The differences between the two samples are minor, apart from perhaps the retrial power, and would suggest that any comparison in years between the two would have the same, or very similar, results. It would appear, therefore, that Graham Zellick's argument is more likely to be supported by the evidence.

However, as discussed in chapter three, it is very difficult to assess the Court's practices in terms of whether it is being strict/restrictive or liberal/less strict due to the difficulty of defining a sensible way of measuring the Court's practices. It is very difficult to say that any particular conviction should be overturned as the Court has to have some way of deciding the meritorious cases from those where leave should not be granted or the appeal should not be quashed. Therefore, whilst we can make an attempt to interpret the Court's powers using these descriptors, the research findings can only be intimations of the approaches that the Court is taking to its task. So whilst Zellick's case is more likely to be supported by the evidence, it is important to point out the limitations of the research indicators as being able to prove that his view is correct.

We do know, however, that there were only minor differences between the two samples and there are potentially a number of reasons for this. As the history of the Court has shown, there have been a number of attempts to liberalise the Court's approach. These have mainly been directed at the Court's approach to factual error appeals as generally the approach the Court takes to due process appeals has not caused too much cause for concern other than perhaps the Court allowing too many guilty people to go free. The reforms of the 1990s were only the second time the Court's powers had been significantly amended but it appears they have fallen foul to the problems that bedevilled the previous powers in the 1960s. If the previous powers were achieving a liberal approach prior to 1995 then it does not really make sense that they had to change as it does seem odd to change the law to capture what is supposed to be a more liberal approach. If the Court was finally adopting a more liberal approach to its powers then it seems the experiment of changing them to encapsulate that approach has not really worked. This is either because it does not matter what powers the Court has, it will interpret them in its own way regardless, or it means there is something more fundamentally wrong here that cannot be changed just by amending the powers. What is clear though from the research conducted for this thesis is the Court's deference for the jury verdict is as strong as ever. This is illustrated by the low number of fresh evidence

appeals, the low number of lurking doubt appeals and the low number of appeals overturned in relation to these grounds and the grounds generally. This backs up Graham Zellick's argument that the Court is more deferential than ever. This suggests that the Court needs a much more fundamental change than amending its powers in times of crisis which will be discussed below.

The review function

As discussed in chapter three, the problems associated with the Court have largely been accepted to be its attitude to the jury and to finality and as chapter four showed also to resources. This is why its powers may change, but its attitude does not appear to. This thesis has sought to argue that it is the Court's review function which is at the root of its problems. This would explain why the Court's powers are continually changed and why its attitude appears to stay the same. The problems it causes have been highlighted throughout this thesis and for the purposes of this chapter it is necessary to examine those problems.

The Court's creation as one of review was an experiment. This is clear from the debates on the 1907 Criminal Appeal Bill which do not make clear what the role of the Court is. The Bill was introduced into the commons by Sir John Walton, the Attorney General. Sir John clearly envisaged the Court taking an investigative role as he pointed out during the debates that the Court would be able to do all that the Home Secretary could do when deciding on the prerogative of mercy and 'the Court would have ample power to get at the truth.'⁶¹⁰ But he also emphasized that the appeal would not be a second trial as 'there should be one trial and one trial only' and 'there should also be a Court of review with the responsibility of deciding whether that trial had been satisfactory and whether the conviction should be quashed or not.'⁶¹¹ He also stated that the anticipated exercise of powers to summon witnesses would be infrequent, being unnecessary in 'ordinary cases.' There was clearly confusion as to the role of the Court as he himself stated that 'in the course of the debate the most contradictory views had been expressed with regard to the functions of the Court of Criminal Appeal'⁶¹² and his conclusion was 'how the experiment would work would largely depend upon the views of the court itself.'⁶¹³

But arguably creating a court of review has not worked to remedy injustice. Sir John states that the Court would have 'ample power to get at the truth' and yet at the same time he states that the Court's role is to decide whether the trial had been 'satisfactory.' That essentially means the review function limits the Court to assessing whether the

⁶¹⁰ HC Debs, 29 July 1907, col 650.

⁶¹¹ *Ibid.*

⁶¹² HC Debs, 31 May 1907, col 235.

⁶¹³ *Ibid.*

proper procedures were followed and whether there was evidence that the jury could convict upon. The Court does not see its role as a search for the truth because that is the role of the jury to determine and in the absence of a serious irregularity or overwhelming new evidence the Court will not interfere. The difficulties of the Court's function and process of review can be seen from the research.

The first problem is the leave process. The single judge grants leave on the basis of reading a transcript of the judge's summing up, counsel's advice on appeal, copies of the trial documents, a list of witnesses and the indictment and record sheet. This work is generally done in the evenings and on the weekend. If the ground of appeal is that the judge was biased in the summing up then this procedure may be adequate but determining a lurking doubt will require more investigation. There was a case in the 2002 sample that illustrated this problem. In *R v Deacon, R v Seymour*,⁶¹⁴ Mr Justice Gibbs made reference to the written reasons of the single judge in refusing leave. These reasons were described as 'unanswerable' by Justice Gibbs but he then went on to say with the benefit of oral argument from appellant counsel, the Court was persuaded to grant leave. This shows the problems of the leave decision being made on paper and the benefit of oral argument. This possibly suggests that if the leave process was one of oral argument there may be more applicants granted leave to appeal.

The second problem is the preparation of appeals. As discussed in chapter three, the Court reviews the case on paper which is usually provided a week before the appeal, and sometimes on the day of the appeal. The judges have to read the papers in addition to normal sitting hours which can be up to five or six hours a day. This does not give the Court a great deal of time, especially in complex cases, so it is fairly easy to see why the bulk of the Court's time is spent reviewing the errors of the trial judge; this is relatively easy for the Court to do in the time it has. It is also relatively easy to do this on paper. If the Court is looking for a lurking doubt or whether an injustice has occurred then this may take much longer than the Court can allow. This process is certainly not conducive to 'getting at the truth' as Sir John envisaged. Therefore, the Court is not even an effective Court of review.

The third problem is the hearing of appeals. These are generally very short and focused as the judges have read the papers beforehand and the burden is then on the appellant to show that the conviction is unsafe. This will not be easy when the judges have already formed their view of the outcome. If the appeal is based on an error of the trial judge then the Court will often be in a position to decide this itself which may give the impression to the appellant that the decision has already been made before the appeal begins. If the Court spends most of its day reviewing errors of the trial judge, which it

⁶¹⁴ [2002] EWCA Crim 260.

appears to do, then it is not surprising these are dealt with fairly swiftly. But persuading the Court there has been a miscarriage of justice in the traditional sense may need more time and if the Court has taken the view of the outcome before appellant counsel can make the argument then this adds to the difficulties in overturning convictions.

The fourth problem is the decision making process. This is linked to the Court's function of essentially deciding whether the trial has been 'satisfactory.' The Court is constantly saying that it cannot delve too deeply into the facts of the case as that is the role of the jury and it does not 'retry' cases. It has been criticised for this but this is correct within its review role. It is not allowed to come to a different decision than the jury and take a different view of the evidence which frequently prevents it remedying injustice. It decides whether convictions are unsafe, not whether appellants are guilty or not. Its role is to essentially review whether the trial process was properly conducted and if not whether the verdict of the jury can still stand. This can account for the very small number of fresh evidence and lurking doubt appeals and the overwhelming number of judge error appeals. Its role is not conducive to deciding fresh evidence and lurking doubt appeals which potentially explains why very few manage to get through the leave filter and very few are successful. This can be illustrated by the fact that fresh evidence was only received by the Court in 50% of cases. Whilst this is not necessarily evidence that the Court is being overly restrictive, this process generally involves the Court reading witness statements on paper when it may be more persuaded by hearing oral argument. The unsatisfactory nature of this process could be evidenced by those appeals and especially the appeal where the Court dismissed evidence it had not heard but had speculated on what it might be.

The Court's basic decision making starts from the position that the jury verdict was the correct one and it then has to be persuaded otherwise. But the methods of persuasion are flawed as they are mainly decided on paper. The starting point of the guilt of the appellant is evidenced by its decision making processes where the irregularity occurred but there was strong prosecution evidence, or the irregularity did not occur in the first place, or the irregularity was minor and did not have an impact on the verdict, or the difficulties of overturning fresh evidence or lurking doubt appeals. Whilst much of the Court's problems can be illustrated by its deference to the jury, this deference was an inevitable result of the creation as a Court of review. If there is to be one trial and one trial only then the Court has to proceed on the basis that the right outcome was achieved in the absence of new evidence or a procedural irregularity.

The relationship between the Court and the jury is a complex one. Much of what the Court decides upon was never before the jury so would not have been considered by it which makes the relationship between them difficult to evaluate. For example, in fresh

evidence appeals, the Court is deciding upon evidence the jury never saw. The problems caused by these appeals were discussed in chapter five. Whether the Court is applying the *Stafford* approach or the jury impact test, it still has to evaluate that new evidence against the evidence that the jury heard and decide whether the conviction is unsafe. As chapter five demonstrated, it is not easy to understand how the Court makes this decision in a way that is different to what the jury are deciding at the trial. In these cases, unsafe has to mean whether the evidence has raised a reasonable doubt about guilt which is what the jury would be considering at the trial. If the Court is deciding according to *Stafford* then it is making its own evaluation of the evidence. It cannot be a review court in that situation but it uses its review function to be restrictive by saying it does not have the power to retry the case and come to a different decision than the jury. But it is difficult to see what unsafe means when the Court does quash the conviction if that is different from the jury finding the defendant not guilty.

It is a similar situation with lurking doubt appeals. The Court is looking for a lurking doubt that the jury never saw. It is reviewing essentially the same evidence and is really being asked that if it was the jury would it have found the appellant not guilty. If so, the conviction should be quashed. But again, it uses its review function to say it is not its role to come to a different decision than the jury who were supposedly in a superior position to view the evidence at trial. And this is true, it is not within its legally defined role to do this. But again, if the Court quashes the conviction in this situation then its view must be that it thinks the appellant is not guilty.

The Court's review function also causes problems for procedural irregularity appeals. These are slightly different than fresh evidence or lurking doubt as they are generally more successful. An appellant, or his lawyers, will know that there is much more chance of success with a procedural irregularity so he/she is often forced to frame the appeal in a technicality. The reasons why they are more successful is fairly obvious. They are easier to locate than fresh evidence, and the Court's decision making process is more conducive to reviewing them than lurking doubts. But whilst they may give rise to more chance of success, the 2002 sample showed that only a small fraction of them are overturned. As discussed in chapter eight, one of the implications of the Court being prepared to remedy unfairness on appeal is more retrials being ordered, or should be ordered. The reason for this is that the more the Court takes on the role of remedying unfairness on appeal the more it moves towards rehearing a case rather than reviewing it. Those who say the Court should not stray into the realms of rehearing suggest that the answer to this conundrum is for the rise in retrials thereby enforcing the role of the jury as the primary decision maker. But again just as with fresh evidence and lurking doubt appeals, appeals based on procedural irregularities do not have anything to do with jury decision making. The Court is being asked to review an irregularity the jury

never saw and it is also being asked to exercise its discretion in a role that is independent to it which is to uphold the integrity of the criminal justice system. It is difficult for the Court to do this when it is constantly deferring to the jury.

If the HRA has had any impact on the Court, and the evidence in chapter seven on this was patchy, then this will potentially be shown in the Court being more willing to make decisions which move away from deciding whether the person is guilty towards looking at the severity of the irregularity and whether it is substantial enough or morally reprehensible enough to warrant the quashing of the conviction despite what it thinks about guilt or innocence. It is difficult to understand deference to the jury in this situation. Whilst the Court's review process may work well for these appeals, because often these irregularities can be viewed on paper, its review function is preventing it from taking a more interventionist approach of remedying unfairness on appeal that the HRA requires. It is still focusing on whether the verdict was one the jury could come to without taking on a role for itself that is independent of the jury that the HRA requires.

It would seem that the review process and function seriously hinders the Court in being able to remedy injustice or unfairness. To some extent it is to blame for this because it uses it as an excuse to be restrictive. But on the other hand it is correct in those judgments that it is not there to retry cases or come to a different decision than the jury as this was the role created it for it. It might now be the time for a much more fundamental change to the Court which moves it away from whether the jury *could* have convicted to whether the jury *should* have convicted.

Review to rehearing?

A solution to the problems of the Court could be to change its function to one of rehearing. If the Court of Appeal was given the power to re-hear the case, as in appeals from magistrates' courts, the first main reason for the Court's deference would be eliminated because the Court would no longer be able to argue that the jury was in a better position to draw inferences than the Court because the jury had seen the witnesses and the Court had not. Although the second main reason for the Court of Appeal's deference is that constitutionally the task of deciding whether a defendant is factually guilty or not is given to the jury and not the Court, the Court does appear to decide on issues of guilt and innocence. There are various judgments where the Court has expressed a view that it felt that there had been a miscarriage of justice in that an innocent person had been wrongly convicted, or at the very least that an injustice had occurred, and judgments such as *Hanratty* show that the Court can and does decide on the basis of guilt. This is to some extent inevitable in fresh evidence and lurking doubt appeals, as discussed above, as both require the Court to form a subjective opinion about the evidence in the case.

If the Court is making decisions based on guilt and innocence, although not allowed within its legally defined role, the wider theoretical question is whether the Court of Appeal should be deciding on guilt and innocence more overtly by rehearing the case. This would clearly remove the constitutional reason for the Court's deference to the jury verdict but in Lord Devlin's view, would undermine the right to trial by jury. But as Pattenden has argued, Lord Devlin's criticism is based on the assumption that the right to trial by jury persists after a trial has already taken place, as the counter view is that a defendant's right to trial by jury is fully satisfied by the original trial. It appears that most of Lord Devlin's criticism, and the RCCJ's support of it, was based on the fact that the effect of the *Stafford* approach was that the case was part heard by the jury and part heard by the Court of Appeal and involved the Court forming its own views on the credibility and reliability of witnesses and also making assumptions about the original jury's decision-making. This led to Lord Devlin's 'imperfect retrial by judges.'

Whilst Lord Devlin, and others, may argue that jury decision making is preferable to judicial decision making, and that cases which involve fresh evidence or procedural irregularities should be sent back to the jury for retrial, this does not solve the problem of the decision making process that the criminal division has to adopt when deciding whether to quash the conviction. If the Court of Appeal is currently using 'an imperfect retrial by judges' to uphold the conviction then arguably it would be preferable for the appellant if the Court were to hear the entire case on appeal, unfettered by the restraints that the Court's review function currently places on it. This would mean that the Court would no longer have to choose between the jury impact test and the *Stafford* approach and the problems they cause in assessing new evidence on appeal against the evidence given at trial, and the Court would no longer have to speculate about jury decision making and make decisions which are not transparent and can never be tested on what the jury did or did not decide with regard to the evidence. It would also mean that the Court felt more able to remedy unfairness on appeal. This could result in more convictions being quashed and the Court would then still have the option of ordering a retrial before a jury.

A rehearing power may also bring more finality to the appeal process which would be welcomed as the current process shows that large numbers of appeals are failing on the first appeal and keep returning to the Court for perhaps a second, third or even fourth go. Whilst the judges may feel that their restrictive approach promotes finality, the large numbers applying to the Criminal Cases Review Commission would contradict this as the vast majority of these appellants have already been through the appeal process. Whilst a rehearing function may not eliminate the Court's attachment to the principle of finality, it would not give the Court as much discretion as the Court's review function currently does to be so restrictive.

However, a rehearing *de novo* is not going to be possible in every case just as a retrial by jury is not possible in every case. If a case is particularly old, as many in the Court of Appeal are because of the length of time it takes to appeal, and the fact that most of the references from the Criminal Cases Review Commission have already been through the appeal process, it may not be practically possible to retry the case on appeal. This potentially means that the number of appeals where a rehearing *de novo* would be possible would be relatively small and therefore the current unsatisfactory process would have to be used for those appeals where a rehearing *de novo* is not possible. Therefore, instead of giving the criminal division the power to rehear the appeal *de novo*, an alternative solution would be to give the criminal division of the Court of Appeal the powers that the civil division currently has. This form of rehearing would allow the criminal division to read all the evidence in the case, including the transcripts of the witnesses, and it would allow the judges to draw their own inferences from the facts and reach their own conclusions on the evidence. Whilst the powers of the civil division are currently more restrictive than before, they are still much wider and extensive than the powers of the criminal division as discussed above. This is particularly anomalous when considering an appellant's liberty may be at stake and there are innocent people serving long prison sentences because the criminal division is not providing an effective mechanism for rectifying miscarriages of justice.

Allowing the criminal division to have all the powers of the civil division may not provide a defendant with rights as extensive as he would have if the appeal to the criminal division was heard *de novo*, but it would give the criminal division much more scope for rectifying miscarriages of justice than the current process and function of review allows. A more thorough investigation of the case on appeal would have an impact on the Court of Appeal in terms of workload and resources but if this proves to be a more effective mechanism for determining appeals then it could prove to be cost effective in the long run as if the appeals were dealt with satisfactorily first time round, it would prevent appeals continuously returning to the Court because the first appeal is often unsuccessful. A lack of resources should never be a reason for not providing an effective mechanism for rectifying miscarriages of justice and if more money is required then it should be found.

If the fundamental problems of the criminal division of the Court of Appeal are not addressed, history will continue to repeat itself with the Court's powers continually being amended in the hope that the Court will liberalise its approach. It seems that unless a fundamental change is made to the Court's structure, miscarriages of justice will continue to go unidentified and uncorrected. It may now be time to acknowledge that creating the Court of Criminal Appeal as a review court did not work as it created a

system where, in Lord Steyn's words, injustice can be tolerated as the price for protecting the jury system.

REFERENCES

- Aberbah, J and Rockman, B (1995) 'Engaging the Periphery – More Busywork for Political Scientists' 28 *Political Science and Politics* 476.
- Ashworth, A (2003) 'Exploring the Integrity Principle in Evidence and Procedure' in P. Mirfield and R. Smith (Eds) *Essays for Colin Tapper* (London: Lexis Nexis).
- Andrews, N (2003) *English Civil Procedure* (Oxford: Oxford University Press).
- Ashworth, A and Redmayne, M (2005) *The Criminal Process* (Oxford: Oxford University Press).
- Auld, R (2001) *Review of the Criminal Courts in England and Wales*.
- Bar Council (1992) *Bar Council's Response to the Royal Commission on Criminal Justice*.
- Beckman, M (1997) 'Cheap Justice' *New Law Journal* 948.
- Blom-Cooper, L (1997) *The Birmingham Six and Other Cases* (London: Duckworth).
- Bowman Committee (1997) *Review of the Court of Appeal* (Civil Division).
- Browne-Wilkinson, T (1998) 'The Impact on Judicial Reasoning' in Markesinis, B (Ed) *The Impact of the Human Rights Act on English Law* (Oxford, Oxford University Press).
- Burnett, C 'Constructions of Innocence' (2002) 70(4) *UMKC Law Review* 971.
- Buxton, LJ (1999) 'The Convention and the English law of criminal evidence. Afterword' in *The Human Rights Act and the Criminal Justice and Regulatory Process* (University of Cambridge, Centre for Public Law).
- Buxton, R (1993) 'Miscarriages of Justice and the Court of Appeal' 109 *Law Quarterly Review* 66.
- Carney, T.F (1972) *Content Analysis: A Technique for Systemic Inference from Communications* (Canada: University of Manitoba Press).
- Choo, A (2008) *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford: Oxford University Press).
- Civil Liberties Trust (1993) *Independent Civil Liberty Panel on Criminal Justice*.
- Cohen, H (1927) 'Twenty Years of Criminal Appeal' *The Law Times*, August 27.
- Clarke, A (1999) 'Safety or Supervision? The Unified Ground of Appeal and its Consequences in the Law of Abuse of Process and Exclusion of Evidence' *Criminal Law Review* 108.
- Commissioners on Criminal Law (1836) *Second Report on the Criminal Law, cmd. 343* (London:HMSO).
- Commissioners on Criminal Law (1845) *Eighth Report on the Criminal Law, Parl. Pap., vol. xiv*, 161.
- Corker, D and Young, D (2003) *Abuse of Process in Criminal Proceedings* (London: Lexis Nexis Butterworths).

- Criminal Appeal Lawyers Association (2006) Quashing Convictions Response.
- Criminal Bar Association (2007) Quashing Convictions Response.
- Criminal Cases Review Commission (2006) Quashing Convictions Response.
- Darbishire, A (1996) 'Criminal Appeal Act 1995', *Solicitors Journal* 486.
- Davies, G., Lloyd-Bostock, S., McCurran, M. & Wilson, C. (Eds) (1996) *Psychology, Law and Criminal Justice International Developments in Research and Practice* (Berlin: Walter de Gruyter).
- Dean, M (1966) 'Criminal Appeal Act 1966' *Criminal Law Review* 535.
- Dennis, I (2003) Fair Trials and Safe Convictions, 56 *Current Legal Problems* 211.
- Devlin, P (1971) *Trial By Jury* (London: Stevens).
- Devlin, P (1976) *Devlin Report, Departmental Committee On Evidence of Identification in Criminal Cases* HC 338.
- Devlin, P (1979) *The Judge* (Oxford: Oxford University Press).
- Di Mambro, D (1999) *Civil Court Manual* (London: Butterworths).
- Donovan Committee *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (1965) (cmdnd 2755, London: HMSO).
- Elks, L, (2008) *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (London: Justice)
- Emmerson, B and Ashworth, A (2001) *Human Rights and Criminal Justice* (London: Sweet and Maxwell).
- Friedland, M (1969) *Double Jeopardy* (Oxford: Clarendon Press).
- Greer, S (1994) 'Miscarriages of Justice Reconsidered' 57(1) *Modern Law Review* 58.
- Herrnson, P (1995) 'Replication, Verification, Secondary Analysis, and Data Collection in Political Science' 28 *Political Science and Politics* 452.
- Hill, P (1996) 'Finding Finality' *New Law Journal* 1552.
- Hochstelter, A et al (2007) 'Toward an Integrated Model of Offending Frequency: A Replication Study 24(4) *Justice Quarterly* 582-599.
- Home Affairs Committee House of Commons Sixth Report, (1981) *Miscarriages of Justice, HC 421* (1981-2).
- Home Office (1994) *Criminal Appeals and the Establishment of a Criminal Cases Review Authority: A Discussion Paper*.
- House of Lords Select Committee (1848), *Report of the Select Committee of the House of Lords on the Administration of the Criminal Law, cmdnd. 523* (London:HMSO);
- Jacob, J (1987) *The Fabric of English Civil Justice* (London: Stevens and Sons).
- James, L (1983) 'Miscarriages of Justice – A Remedy in Prospect' *Justice of the Peace* 155.

- Jolowicz, JA (2000) *On Civil Procedure* (Cambridge: Cambridge University Press).
- JUSTICE Committee (1964) *Criminal Appeals* (London: Stevens and Sons).
- JUSTICE Committee (1989) *Miscarriages of Justice* (London: Justice).
- JUSTICE (1994a) *The Criminal Cases Review Authority Executive Summary*.
- JUSTICE (1994b) *Remedying Miscarriages of Justice*.
- JUSTICE (2006) *Quashing Convictions Response*.
- King, G (1995) 'Replication, Replication' 28 *Political Science and Politics* 444.
- Knight, M (1970) *Criminal Appeals* (London: Stevens and Sons).
- Knight, M (1975) *Criminal Appeals Supplement 1969-1973* (London: Stevens and Sons).
- Krippendorff, K (1980) *Content Analysis: An Introduction To Its Methodology* (USA: Sage Publications).
- Law Commission (1986) *Power of the Court of Appeal Criminal Division to Order a Retrial* (unpublished).
- Law Society (2006) *Quashing Convictions Response*.
- Leigh, L (1977) 'New Trials in Criminal Cases' *Criminal Law Review* 525.
- Leigh, L (2006) 'Lurking Doubt and the Safety of Convictions' *Criminal Law Review* 809.
- Liberty (2006) *Response to the Office for Criminal Justice Reform: Quashing Convictions*.
- Malet, D (1995) 'The New Regime for the Correction of Miscarriages of Justice', *Justice of the Peace* 716.
- Malleson, K (1991) 'Miscarriages of Justice and the Accessibility of the Court of Appeal' (1991) *Criminal Law Review* 323
- Malleson, K (1993) *Review of the Appeal Process, RCCJ Research Study No 17* (London, HMSO).
- Malleson, K (1994) 'Appeals Against Conviction and the Principle of Finality' *Journal of Law and Society* 151
- Malleson, K (1996) *Appeals Against Conviction in the Court of Appeal*, Unpublished Ph.D Thesis (University of London).
- Malleson, K (1997) 'Decision making in the Court of Appeal: The Burden of Proof in an Inquisitorial Process' *International Journal of Evidence and Proof* 175.
- Malleson, K and Roberts, S (2002) *Streamlining and Clarifying the Appellate Process*, *Criminal Law Review* 272.
- McCartney, C and Walker, C, 'Criminal Justice and Miscarriages of Justice in England' in Huff, R and Killias, M, (Eds) *Wrongful Conviction* (Philadelphia: Temple University Press).
- Naughton, M (2007) *Rethinking Miscarriages of Justice* (Hampshire: Palgrave Macmillan).

- Neuendorf, K (2002) *The Content Analysis Guidebook* (California: Sage Publications)
- Nobles, R and Schiff, D 'Miscarriages of Justice: A Systems Approach' (1995) 58(3) *Modern Law Review* 299.
- Nobles, R and Schiff, D (1996) 'Criminal Appeal Act 1995: The Semantics of Jurisdiction' *Modern Law Review* 573
- Nobles, R and Schiff, D (1997) 'The Never Ending Story: Disguising Tragic Choices in Criminal Justice' 60(2) *Modern Law Review* 293.
- Nobles, R and Schiff, D (2000) *Understanding Miscarriages of Justice* (Oxford, Oxford University Press).
- Nobles, R and Schiff, D (2001) 'Due Process and Dirty Harry Dilemmas: Criminal Appeals and the Human Rights Act' 64(6) *Modern Law Review* 911
- Nobles, R and Schiff, D (2002) 'The Right to Appeal and Workable Systems of Justice' 65(5) *Modern Law Review* 676
- Nobles R and Schiff, D, (2004) 'A Story of Miscarriage: Law in the Media' 31(2) *Journal of Law and Society* 221.
- Nobles, R and Schiff, D (2005) 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' (2005) *Criminal Law Review* 173.
- Nobles, R and Schiff, D (2008) 'Absurd Asymmetry – a Comment on R v Cottrell and Fletcher and BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission' 71(3) *Modern Law Review* 464.
- O'Connor, D (1969) *The Power of the Criminal Appeal Courts to Order New Trials; An Historical and Comparative Study of the Law of Australia, Canada and England*. Unpublished Ph.D Thesis (University of London)
- O'Connor, P (1990) 'The Court of Appeal: Re-Trials and Tribulations' *Criminal Law Review* 615.
- O'Halloran, CH (1949) 'Development of the Right of Appeal in England in Criminal Cases' 27 *Canadian Bar Review* 153.
- Ormerod, D and Taylor, N (2004) 'Mind the Gaps: Safety, Fairness and Moral Legitimacy' *Criminal Law Review* 266.
- Pattenden, R, (1996) *English Criminal Appeals 1844 – 1994* (Oxford, Oxford University Press);
- Quirk, H (2007) Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer 70(5) *Modern Law Review* 759.
- Roberts, S and Weathered, L (2009) Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission 1 *Oxford Journal of Legal Studies* 43.
- Ross, RE (1911) *The Court of Criminal Appeal* (London: Butterworth and Co.).
- Royal Commission on the Law Relating to Indictable Offences (1879), Report of the Royal Commission on the Law Relating to Indictable Offences, cmd. 2345. (London:HMSO).

Runciman Royal Commission on Criminal Justice (1993) (Report, cmdnd 2263, London: HMSO).

Samuels, A (1975) 'Fresh Evidence in the Court of Appeal' *Criminal Law Review* 23.

Samuels, A (1984) 'Appeals Against Conviction: Reform' *Criminal Law Review* 337.

Savage, S et al (2007) Putting Wrongs to Right: Campaigns Against Miscarriages of Justice 7(1) *Criminology and Criminal Justice* 83.

Seaborne Davies, D (1951) 'The Court of Criminal Appeal: The First Forty Years' 1 *J.S.P.T.L.* 425

Smith, JC (1995a) 'The Criminal Appeal Act 1995: (1) Appeals Against Conviction' *Criminal Law Review* 920.

Smith, JC (1995b) 'Criminal Appeals and the Criminal Cases Review Commission' *New Law Journal* 532.

Smith, JC (1995c) 'Criminal Appeals and the Criminal Cases Review Commission 2' *New Law Journal* 572.

Sniderman, P (1995) 'Evaluation Standards for a Slow Moving Science' 28(3) *Political Science and Politics* 464.

Solomon, E et al (2007) *Ten Years of Criminal Justice Under Labour* (London: Centre For Crime and Justice Studies).

Spencer, JR (1982) 'Criminal Law and Criminal Appeals: The Tail That Wags the Dog' *Criminal Law Review* 260.

Spencer, JR (1989) *Jackson's Machinery of Justice* (Cambridge: Cambridge University Press).

Spencer, JR (2006) 'Does Our Present Criminal Appeal System Make Sense' *Criminal Law Review* 677.

Spencer, JR (2007) 'Quashing Convictions for Procedural Irregularities' *Criminal Law Review* 835.

Taylor, N and Mansfield, M (1999) 'Post-conviction Procedures' in Walker, C & Starmer, K (Eds) *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press).

Thomas, DA (1966) 'England: Post-Trial Procedure in Coutts' JA (Ed) *The Accused* (London: Stevens and Sons).

Tregilgas-Davey, M (1991) 'Miscarriages of Justice Within The English Legal System Part 2' *New Law Journal* 715.

Tucker Committee *Report of the Departmental Committee on New Trials in Criminal Cases* (1954) (cmdnd 9150, London: HMSO).

Wadham, J and Missen, C (1996) 'Criminal Appeal Act 1995' *Legal Action* 21

Walker, C (1999) 'Miscarriages of Justice in Principle and Practice' in C. Walker and K. Starmer (eds) *Miscarriages of Justice A Review of Justice in Error* (London, Blackstone Press).

Weber, R.P (1990) *Basic Content Analysis* 2nd Ed. (USA: Sage Publications).

Widgery Report of the Departmental Committee on Legal Aid in Criminal Proceedings (1966) Cmnd. 2934.

Williams, G (1963) *Proof of Guilt*, 3rd Ed. (London: Stevens and Sons).

Woffenden, B (1987) *Miscarriages of Justice* (London: Hodder and Staughton).

Woolf, Lord (1996) *Access to Justice*. Final Report (London: HMSO).

Zellick, G (2005) 'The Criminal Cases Review Commission and the Court of Appeal: the Commission's Perspective' *Criminal Law Review* 937.

APPENDIX ONE: DATA COLLECTION

Court of Appeal (Criminal Division) Appeals Against Conviction 2002

Date: Name: Counsel/Non-Counsel:

Offence: Sentence:

Application for leave refused/granted:

Appeal allowed/dismissed:

Statutory ground(s) of appeal:

Detail of grounds:

Court's approach re 'Unsafe':

Application of 'Lurking Doubt'

Court's approach to retrial (where raised):

Fresh Evidence Cases

Date: Name: Counsel/Non-counsel:

Offence: Sentence:

Argument for fresh evidence heard orally/paper:

Decision:

Nature of fresh evidence:

Court's reason for admitting/excluding it:

Court's reason for allowing/dismissing appeal:

Court's approach when quashing conviction:

APPENDIX TWO: CODING FRAME

[illegible]

